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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 206.

PHILADELPHIA BAR ASSOCIATION

DANIEL CHAPMAN, APPELLANT,

vs.

JOSEPH W. BREWER, ASSIGNEE OF BENJAMIN C. HOYT, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED MAY 8, 1882.

accession 21819

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INDEX.

	Original.	Print.
Bill of complaint	1	1
Subpœna	8	5
Marshal's return	9	5
Appearance	10	6
Answer	12	7
Replication	16	8
Order fixing time to take testimony	18	9
Exhibit B—Affidavit of Daniel Chapman, Jan. 12, 1874	19	9
Transcript from Berrien county circuit court	20	10
Narr	20	10
Attachment	22	12
Sheriff's return	23	12
Appraiser's report	24	13
Sheriff's report	25	14
Order of default	26	14
Affidavit of death, &c.	27	15
Order on suggestion of death, &c.	28	15
Judgment	30	16
Order making default absolute	31	17
Bill of costs	32	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Execution, May 8, 1874	34	18
Dec. 16, 1874	35	19
Sheriff's return, May 8, 1874	37	19
Dec. 16, 1874	38	20
Clerk's certificate	39	20
Exhibit A—Assignment in matter of Benj. C. Hoyt, bankrupt, in District court U. S.	40	20
Testimony of Joseph W. Brewer	43	22
Consent for substitution of solicitors	46	23
" " "	47	23
Order for substitution of solicitors	48	23
Stipulation as to evidence, &c.	49	24
Transcript from D. C. U. S. in matter of B. C. Hoyt, bankrupt	51	25
Petition for adjudication	51	25
Amended petition	54	26
Order on suggestion of death, &c.	57	28
Denial of bankruptcy	59	29
Order for adjudication, &c.	61	29
Clerk's certificate	63	30
Report of master	64	30
Notice for trial	66	31
Decree	68	32
Affidavits for rehearing	72	34
Petition for rehearing	78	36
Order taking petition under advisement	83	37
Opinion	84	38
Order overruling motion for rehearing	90	39
Injunction	91	40
Petition for appeal	96	42
Order allowing appeal	97	42
Justifying affidavits	98	42
Bond	99	43
Citation	101	43
Proof of service	102	44
Clerk's certificat	103	44

1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. In Equity.

To the judges of the circuit court of the United States for the western district of Michigan:

Joseph W. Brewer, of the village of St. Joseph, in the county of Berrien, in said district, assignee of the estate and effects of Benjamin C. Hoyt, a bankrupt, brings this his bill against Daniel Chapman, Joseph W. Weimer, and James Graham, citizens of the State of Michigan, and residing in the county of Berrien aforesaid, and thereupon your orator complains and says:

1st. That on or about the 10th day of October, 1873, said Benjamin C. Hoyt and Enoch C. Hoyt, since deceased, were engaged in business together, at St. Joseph aforesaid, as bankers and dealers in real estate as copartners under the firm name and style of B. C. Hoyt & Son; that they resided and carried on said business at that place for several years prior to that date.

2nd. That on or about the day and year last aforesaid one John Whittelsy, one of their creditors, filed a petition for an adjudication in bankruptcy against said Benjamin C. Hoyt and Enoch C. Hoyt in the district court of the United States for said district, alleging therein among other things that he was a creditor of said Benjamin C. Hoyt and Enoch C. Hoyt, copartners in the banking business as aforesaid, who, for a period of more than two years next preceding the date of filing his petition, had resided at the village of St. Joseph aforesaid.

2 That his demand was provable against the said Benjamin C. and Enoch C. Hoyt in accordance with the provisions of an act of Congress, entitled An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867.

That he believed said B. C. Hoyt & Son owed debts to an amount exceeding the sum of three hundred dollars, and that his own demand exceeded the amount of two hundred and fifty dollars, and that the nature thereof was a certain promissory note for the sum of $1,400, signed by said B. C. Hoyt & Son, dated April 3rd, 1873, and payable to the order of said petitioner on demand after date.

That within the six calendar months next preceding the date of said petition, and within said district, said Benjamin C. and Enoch C. Hoyt had committed two acts of bankruptcy, viz., in that they, being bankers as aforesaid, had fraudulently stopped payment of their commercial paper, and also in that they, being bankers as aforesaid, had suspended, and not resumed payment of their commercial paper within a period of fourteen days. Your orator also shows that the usual order to show cause was thereupon made by said district court, and a certified copy thereof duly served on said Benjamin C. and Enoch C. Hoyt, who subsequently, and in due time, appeared in said bankruptcy matter; all of which will more fully and at large appear, reference being had to the files and records in

said bankruptcy proceedings, or to duly certified copies thereof, ready to be produced and proven as this honorable court shall direct.

3rd. That during the pendency of said proceedings in bankruptcy in said district court, and on or about the 23rd day of February, 1874, said Enoch C. Hoyt departed this life, and his death was suggested to said court, and the proceedings ordered by it to be continued against said Benjamin C. Hoyt by an order dated May 2d, 1874.

4th. That such proceedings were thereupon had in said dis-
3 trict court that afterwards, and on or about the first (1st) day of June, 1874, an adjudication of bankruptcy was duly made against said Benjamin C. Hoyt in and by said district court; and your orator afterwards, and on or about the 4th day of September, 1874, was duly elected assignee of the estate and effects of said bankrupt and has received from the register in bankruptcy having the matter of said bankruptcy in charge a deed of assignment, duly executed by him in the usual form, of all the estate and effects of said bankrupt, to which, or a certified copy thereof ready to be produced and proven, your orator asks leave, for greater certainty, to refer; and your orator shows that since his said election he has been and is now acting as assignee as aforesaid.

5th. That some time after the filing of the petition in bankruptcy, and on or about the 8th day of May, 1874, the defendant, Daniel Chapman, recovered judgment in the circuit court for the county of Berrien aforesaid against said Benjamin C. Hoyt for the sum of $4,930.15 damages, and costs of suit, taxed at $30.50, upon which an execution in usual form subsequently issued out of and under the seal of said court, which was delivered to said Joseph W. Weimer, who then was, and now is, sheriff of said county, who, in virtue thereof, has, since the commencement of said proceedings in bankruptcy, and on or about the 8th day of May, 1874, levied upon the following-described real estate, situate in said county of Berrien, in the State of Michigan and western district thereof, viz: lots numbered one hundred and three (103), one hundred and four (104), one hundred and eleven (111), the east sixty (60) feet of lot one hundred and ninety-two (192); also lots three hundred (300) and twenty-two (22) feet west of the east twenty feet of lot number two hundred and twenty-eight (228); also lots three hundred and one (301) and three hundred and two (302), all in the village of St. Joseph, accord-
4 ing to the recorded plat thereof; also University lots numbered fifty-three (53), sixty (60), sixty-nine (69), seventy-six (76), and eighty-five (85), in section twenty-six (26), town four (4) south, of range nineteen (19) west; also the north thirty-seven (37) and thirty-four one-hundredths of an acre of the northwest quarter of section two (2), town four (4) south, of range eighteen (18) west; all in said county of Berrien; which said real estate he has threatened to sell under said execution.

6th. That afterwards, and on or about the 16th day of December, 1874, while the execution mentioned in paragraph 5 was still in the hands of said sheriff, and without any return thereof having been first made, a pretended alias execution was issued out of, and under

the seal of said circuit court, on the judgment aforesaid, which was delivered to said defendant, James Graham, who then was, and now is, a deputy sheriff for said county of Berrin, who, in virtue thereof, did, on or about said 16th day of December, 1874, levy upon the following-described real estate, situate in the county of Berrien aforesaid, viz: Lot sixty-five (65) in the village of St. Joseph aforesaid, according to said recorded plat; also lot five (5), in block forty-three (43); also block eleven (11), block twenty (20), block thirty-three (33); also lots two (2), three (3), and seven (7), in block fifty-one (51); lots five (5), six (6), and seven (7), in block fifty-two (52); all being in B. C. Hoyt's first addition to the village of St. Joseph aforesaid; also lots two (2), three (3), four (4), seven (7), and eight (8), in block fifty-eight (58); lots one (1), two (2), and four (4), in block fifty-nine (59); lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8), in block sixty-seven (67); lots one (1), two (2), three (3), and seven (7), in block sixty-eight (68); all being in B. C. Hoyt's second (2nd) addition to said village of St. Joseph; which said real estate said James Graham has threatened to sell under said alias execution.

5 7th. That neither of said executions have been returned, but they are still in the hands of said Weimer and Graham respectively, or in the hands of said Weimer alone.

8th. That the real estate so levied upon was the separate property of said Benjamin C. Hoyt at the date of filing said petition as aforesaid, and your orator, as assignee as aforesaid, continues to be, and now is, the owner of all thereof, except lots 103 and 104, 300, 302–65, and 301, in said village of St. Joseph; also, University lots 53, 60–69, 76, and 85, in section twenty-six (26), town 4 south, of range 19 west, and that said levies constitutes a cloud on your orator's title thereto, and greatly embarrasses and hinders him in the disposal thereof, and the usual notices of said levies have been filed and recorded in the office of the register of deeds of said county.

9th. That your orator, as assignee as aforesaid, is in actual possession of said above-described real estate (excepting that especially described in paragraph 8), and that the same is of the value of nine thousand dollars, or thereabouts.

In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can only be relieved in a court of equity, where matters of this kind are properly cognizable and reli[ev]able, to the end, therefore, that the said Daniel Chapman, Joseph W. Weimer, and James Graham may full, true, direct, and perfect answer make (without oath, their answers under oath being hereby waived) to all and singular the matters and things above stated, as fully and particularly as if the same were here again repeated and they interrogated thereto; and

1. That said levies may be decreed to be entirely void and
6 of no effect as against your orator as assignee as aforesaid, and that said defendants may be decreed to release unto your orator as such assignee, all their right, title, and interest, in and to said real estate (except that described in paragraph 8), acquired under and in virtue of said levies, and upon their failure so to do,

that said decree shall be ordered to have the effect of said release, and that your orator may have leave to record the same in the office of the register of deeds for said county of Berrien.

2. That the defendants may be enjoyed by the decree of this court from selling, disposing of, or interfering with said real estate, under and in virtue of said levies, except that described in paragraph 8.

3. And that your orator may have such other and further relief, the premises being considered, as to this court shall seem equitable and just.

4. That a writ of injunction may be issued out of and under the seal of this court, directed to said Daniel Chapman, Joseph W. Weimer, and James Graham, their attorneys, counsels, and solicitors, servants, agents, and workmen, commanding them, and each of them, that they do absolutely desist and refrain from, in any way or manner, selling, disposing of, or interfering with said real estate, under and in virtue of said levies, except that described in said paragraph 8.

5. And that the writ of subpœna may issue out of and under the seal of this court, to be directed to the said Daniel Chapman, Joseph W. Weimer, and James Graham, the defendants, commanding them, and each of them, by a certain day, and under a certain penalty to be therein instructed, to be and appear in this court, and then and there to answer the premises, and further to stand to and abide such order and decree therein, as shall be agreeable to equity and good conscience.

And your orator will ever pray, &c.

JOSEPH W. BREWER

EGGLESTON & KLEINHANS,
Sol'rs & of Counsel for Complainant.

7 UNITED STATES OF AMERICA, } ss:
Western District of Michigan, }

On this 26th day of January, 1876, before me, the undersigned, personally appeared Joseph W. Brewer, by whom the foregoing bill of complaint was subscribed, who, being by me duly sworn, made solemn oath that he had read the same, and knew the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and that as to those matters he believes it to be true.

[SEAL.] JAMES H. CANFIELD,
Notary Public, Berrien Co., Michigan.

[Endorsed:] No. 125. U. S. circuit court for the west. dist. of Michigan. In equity. Joseph W. Brewer, assignee, *vs.* Daniel Chapman *et al.* Bill to remove cloud. Filed Jan'y 27th, '76. Chester B. Hinsdill, clerk. Eggleston & Kleinhans, sol'rs for compl't.

8 UNITED STATES OF AMERICA, *Western District of Michigan,* } *ss:*

The President of the United States of America to Daniel Chapman, Joseph W. Weimer, and James Graham, Greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the western district of Michigan, at Grand Rapids, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Joseph W. Brewer, assignee of the estate and effects of Benjamin C. Hoyt, a bankrupt, this day filed in the clerk's office of said court, in said city of Grand Rapids, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of Michigan to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Grand Rapids aforesaid, this *day* 27th day of January, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL] CHESTER B. HINSDILL, *Clerk.*

Memorandum.

The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Grand Rapids aforesaid, on or before the [day] to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

CHESTER B. HINSDILL, *Clerk.*

9 WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 31st day of January, A. D. 1876, I served the within writ on Daniel Chapman, Joseph W. Weimer, and James Graham, defendants within named, at Berrien Springs, in said district, by delivering to each of them personally a true copy whereof, with like memorandums offered thereto as to hereto appended, and at the same time showing each of them the seal of the court on original writ.

JOHN PARKER,
U. S. Marshal,
By J. CUSHAN BURR,
D'y U. S. Marshal.

Travel, 102 miles	$6 12
Service (3)	6 00
Copies (3)	1 50
	$13 62

[Endorsed:] No. 125. Circuit court of the United States, western district of Michigan. J. W. Brewer, assignee, &c., compl't, *vs.* Daniel Chapman *et al.*, def'ts. Chancery subpœna. Filed Feb'y 5, A. D. 1876. Chester B. Hinsdill, clerk, by A. B. Carrier, deputy. Eggleston & Kleinhans, compl't's sol'rs.

10 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Western District of Michigan.

JOSEPH W. BREWER, Assignee, &c., Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.
} In Chancery.

On motion of C. B. Potter, solicitor for said defendants, Daniel Chapman, Joseph W. Weimer, and James Graham, ordered that the appearance of said defendants be, and the same is hereby, entered.

And, on like motion, it is further ordered that the complainant serve upon the said solicitor a copy of his bill of complaint filed in this cause, within twenty days after service upon him, or his solicitor of notice of this order, or, in default thereof, that said bill be dismissed, with costs.

To —— ——, solicitor for complainant:

Please take notice that the foregoing is a true copy of an order this day entered in the above entitled cause.

Dated —— ——, 187--.

C. B. POTTER,
Solicitor for Defendants.

11 [Endorsed:] No. 125, B. The circuit court of the United States, western district of Michigan. In chancery. Joseph W. Brewer, assignee, &c., complainant, *vs.* Daniel Chapman, Joseph W. Weimer, and James Graham, defendants. Order for copy of bill and notice. Filed this 28th day of February, 1876. A. B. Carrier, deputy clerk. C. B. Potter, solicitor for defendants.

The Joint and Several Answer of Daniel Chapman, Joseph W. Weimer, and James Graham, Defendants, to the Bill of Complaint of Joseph W. Brewer, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Complainant.

12 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee, &c., Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

1st. Defendants admit that said Benjamin C. Hoyt and Enoch C. Hoyt were engaged in the business as partners, at the time and place as alleged in the bill of complaint.

2nd. Defendants admit that a certain petition of John Whittlesy for this adjudication in bankruptcy of said Benjamin C. Hoyt and Enoch C. Hoyt—the validity of which petition is not admitted, but denied—was filed in the said district court at or about the date alleged in the said bill, but deny that said Benjamin C. Hoyt was ever adjudicated a bankrupt upon the footing of that petition.

3rd. Defendants admit the death of said Enoch C. Hoyt at or about the date alleged in complainant's bill.

13 4th. Defendants admit that in form said Benjamin C. Hoyt was adjudicated bankrupt in the said district court, but not upon th epetition mentioned in the said bill of complaint, nor upon any petition whereof the said Benjamin C. Hoyt had notice, and that complainants was in form elected assignee at or about the date alleged in said bill, but deny that said adjudication was valid in law or that said complainants was or could be lawfully elected such assignee, and they leave the complainant to his proofs.

5th. Defendants admit that on the eighth day of May, A. D. 1874, the defendant Chapman recovered judgment against said Benjamin C. Hoyt in the circuit court [for] the county of Berrien, Michigan, and the execution issued thereon was levied upon the property of said Benjamin C. Hoyt, as in said bill alleged; and they further aver and show that the suit in which such judgment was obtained was duly commenced by writ of attachment on the twelfth day of January, A. D. 1874; all necessary proceedings, to wit, — said circuit court for the county of Berrien, with jurisdiction of said attachment suit having been duly taken, and that by virtue of the writ whereby said suit was commenced, the real estate mentioned in said bill was, on the said twelfth day of January, A. D. 1874, duly seized and levied upon, and the proper endorsements and certificates for the purpose of making said levy effectual were then duly made and filed, and that said writ of attachment was duly and personally levied upon the defendant therein on or before the return day thereof.

6th. Defendants admit that an alias execution was issued, placed in the hands of defendant Graham for service, and by him levied, at or about the date as in said bill alleged.

7th. Defendants admit that neither of said executions have been returned, and that they are in the hands of defendants Weimer and Graham respectively.

8th. Defendants admit that the property levied upon was the separate property of said Benjamin C. Hoyt, but they deny
14 that the title to said property ever vested in said complainant as assignee or otherwise, and they deny that said levies are a cloud upon any title of complainant.

9th. Defendants have no knowledge as to the possession of said property, and they leave the complainant to his proofs.

10th. Defendants submit to this court that with respect to all of the matters complained of or against them, the said complainant is not entitled to any relief against them in a court of equity, and these defendants hope they may have the same benefit of this defense as if they had demurred to the bill of complaint.

All which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct, and hereby pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

DANIEL CHAPMAN.
JOSEPH W. WEIMER.
JAMES GRAHAM.

C. B. POTTER,
Solicitor and of Counsel for Defendants.

15 [Endorsed:] No. 125, B. United States circuit court, western district of Michigan. In equity. Joseph W. Brewer, assignee, &c., complainant, *vs.* Daniel Chapman, Joseph W. Weimer, and James Graham, defendants. Joint and several answer of defendants. Filed April 13th, '76. Chester B. Hinsdill, clerk. C. B. Potter, solicitor for defendants.

16 *The Replication of Joseph W. Brewer, Assignee as aforesaid, Complainant to the Answer of Daniel Chapman, Joseph W. Weimer, and James Graham, Defendants.*

The Circuit Court of the United States for the Western District of Michigan. In Chancery.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Compl't,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Def'ts.
} In Equity.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of ex-

ception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto say: That he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law, to be answered unto; and that the said answer is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant now is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

EGGLESTON AND KLEINHANS,
Solicitors for Compl[ain]ant.

17 [Endorsed:] No. 125, B. The U. S. circuit court for the western dist. of Michigan. Joseph W. Brewer, assignee, &c., complainant, *vs.* Daniel Chapman *et al.*, defendants. Replication. Filed this 1st day of May, 1876. Chester B. Hinsdill, clerk. Eggleston & Kleinhans, solicitors for complainant.

18 The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Compl't,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM.

On motion of Eggleston and Kleinhans, solicitors for complainants, I do hereby order and direct that five days' notice of the time and place of the examination of witnesses in this cause shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties.

Dated July 6, 1876.

CHESTER B. HINSDILL,
Master in Chancery and Examiner.

[Endorsed:] No. 125, B. U. S. circuit court, west. dist. of Mich. In equity. J. W. Brewer, assignee, &c., compl't, *vs.* Daniel Chapman *et al.*, def'ts. Order. Filed July 6th, '76. Chester B. Hinsdill, clerk.

19 STATE OF MICHIGAN, }
County of Berrien, } *ss:*

Daniel Chapman, of said county, being duly sworn, deposes and says that Benjamin C. Hoyt and Enoch C. Hoyt, copartners, firm-name of B. C. Hoyt & Son, of St. Joseph, in said county, are indebted to him in the sum of four thousand eight hundred and ninety-five dollars and forty-four cents over and above all legal set-offs and de-

mands, as near as this deponent can estimate the sum, and that the said sum of money is now due upon contract, express and implied; and this deponent further says that he has good reason to believe, and does believe, that the said Benjamin C. Hoyt and Enoch C. Hoyt have assigned, disposed of, and concealed their property with intent to defraud their creditors.

DANIEL CHAPMAN.

Subscribed and sworn to before me, this 12th day of January, A. D. 1874.

GEORGE H. MURDOCH,
Justice of the Peace.

[Endorsed:] Exhibit B. Filed January 12th, 1874.

20 STATE OF MICHIGAN, } *ss:*
County of Berrien, }

In the Circuit Court for the County of Berrien, of the ——— day of ———, A. D. 187—.

Daniel Chapman, plaintiff herein, by Potter & Potter, his attorneys, complains of Benjamin C. Hoyt and Enoch C. Hoyt, copartners under the firm name of B. C. Hoyt & Son, defendants herein, who have been duly summoned by writ of attachment to answer the said plaintiff of a plea of trespass on the case upon promises.

For that, whereas, the defendants, on the twelfth day of January, A. D. 1874, at St. Joseph, in said county of Berrien, were indebted to the plaintiff in the sum of ten thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at defendants' request;

And in a like sum for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendants at defendants' request;

And in a like sum for money then and there lent by the plaintiff to the defendants at defendants' request;

And in a like sum for money then and there paid by the plaintiff for the defendants at defendants' request;

And in a like sum for money then and there received by the defendants for use of the plaintiff;

And in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants afterwards, and on the day and year aforesaid, in consideration of the premises, respectively, then and there promised the plaintiff to pay him the said several sums of money, respectively, on request; yet the said defendants have disregarded their said promises, and have not, although often requested so to do, paid any of the said sums of money, or any part thereof, to the plaintiff's damage of ten thousand dollars, and therefore he brings suit, etc.

POTTER & POTTER,
Plaintiff's Attorneys.

To the above-named defendants:

Take notice, that on the trial of the above cause the plaintiff, under the money counts, will give in evidence five certain certificates or notes, copies of which are given below.

POTTER & POTTER,
Plaintiff's Attorneys.

[5-cent stamp.] Copy.

REAL ESTATE AND EXCHANGE OFFICE OF B. C. HOYT,
$1,400.00. ST. JOSEPH, MICH., *December 29th*, 1870.

Daniel Chapman, Esq., has deposited in this office fourteen hundred dollars to the credit of himself, payable to his order on the surrender of this certificate properly endorsed, with ten per cent. interest.

No. 2001. B. C. HOYT & SON.

REAL ESTATE & EXCHANGE OFFICE OF B. C. HOYT,
$900.00. ST. JOSEPH, MICH., *July* 20, 1871.

Daniel Chapman has deposited in this office nine hundred and $\frac{11}{000}$ dollars to the credit of himself, payable to his order on the surrender of this certificate properly endorsed, with ten per cent. interest from date.

No. 2248. B. C. HOYT & SON.

21 REAL ESTATE AND EXCHANGE OFFICE OF B. C. HOYT,
$441.20. ST. JOSEPH, MICH., *Feb. 24th*, 1872.

Daniel Chapman has deposited in this office four hundred forty-one and $\frac{20}{100}$ dollars to the credit of himself, payable to his order on the surrender of this certificate properly endorsed, with interest [at] 10 per cent.

B. C. HOYT & SON,
No. 2413. Per E. M. HIPP.

REAL ESTATE & EXCHANGE OFFICE OF B. C. HOYT & SON,
$2,225.00. ST. JOSEPH MICH., *July* 9, 1873.

Daniel Chapman, Esq., has deposited in this office twenty-two hundred & twenty-five dollars to the credit of himself, payable to his order on the surrender of this certificate properly endorsed, with interest at 10 per cent per annum.

No. 3674. B. C. HOYT & SON.

REAL ESTATE AND EXCHANGE OFFICE OF B. C. HOYT & SON,
$1,217.93 ST. JOSEPH, MICH., *Aug.* 27, 1873.

Daniel Chapman, Esq., has deposited in this office twelve hundred and seventeen $\frac{93}{100}$ dollars to the credit of himself, payable to his order on the surrender of this certificate properly endorsed, with int. at 10 per cent.

No. 3698. B. C. HOYT & SON.

[Endorsed:] Narr. Filed March 21st, 1874.

22 STATE OF MICHIGAN, } ss:
County of Berrien, }

The circuit court for the county of Berrien, in the name of the people of the State of Michigan, to the sheriff of the county of Berrien, Greeting:

You are commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendants, Benjamin C. Hoyt and Enoch C. Hoyt, copartners under the firm name of B. C. Hoyt & Son, not exempt from execution, wheresoever the same may be found within the county of Berrien, as will be sufficient to satisfy the demand of Daniel Chapman, plaintiff, in the sum of four thousand eight hundred ninety-four dollars and forty-four cents over and above all legal set-offs and costs of writ, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in this attachment.

And in case you shall seize any property of said defendants in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendants subject to attachment, sufficient with that seized in said county of Berrien to satisfy said demand and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant, if to be found within said county of Berrien, or in any other county of the State of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of Berrien, at the court-house, in Berrien Springs, on Tuesday, the third day of March, 1874, at 10 o'clock in the forenoon of said day, to answer the plaintiff. And of this writ make due return.

Witness the honorable Henry H. Coolidge, circuit judge, at the Berrien Springs, this twelfth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL] DAVID E. HINMAN, *Clerk.*
——— ———, *Deputy Clerk.*

[Endorsed:] Filed January 12, 1874.

23 STATE OF MICHIGAN, } ss:
County of Berrien, }

I do hereby return that, by virtue of the writ of attachment hereunto annexed, I did, on the 12th day of January, A. D. 1874, attach the following-described real estate, lying and being in the county of Berrien and State of Michigan, to wit: Lots No. one hundred and three (103), one hundred and four, one hundred and eleven (111), and the east sixty-six feet of lot one hundred and ninety-two (192), lots three hundred (300), twenty-two feet west of the east twenty feet of lot No. two hundred and twenty-eight (228), also three hundred and one (301), three hundred and two (302), all in the village of St. Joseph, according to the recorded plat thereof; also University lots No. fifty-three (53), sixty (60), sixty-nine (69), seventy-six (76), and eighty-nine (89), all in section twenty-six (26), town 4 south, of

range nineteen west; also the north thirty-seven and thirty-four one-hundredths acres of the northwest quarter of section two (2), town 4 south, of range 18 west, all in Berrien county, Michigan; all of which said property was appraised by Charles D. Nichols and James M. Platt, two disinterested freeholders of said county of Berrien, who was by me first duly sworn by me for that purpose, and whose appraisal is in writing, signed by themselves, and herewith returned.

And I further certify and return that on the 3d day of March, A. D. 1874, I served on the defendant personally a certified copy of the writ of attachment and a true copy of the inventory of the property attached on Benjamin C. Hoyt, one of the defendants in said writ of attachment.

Dated the 3d day of March, 1874.

JOSEPH W. WEIMER, *Sheriff.*

My fees, $9.50.

Filed January 12th, A. D. 1874.

24 STATE OF MICHIGAN, } *ss:*
County of Berrien, }

We, the undersigned, two disinterested freeholders of said county, being selected and appointed by Joseph W. Weimer, sheriff of Berrien county, to appraise the following-described real estate, lying and being in the county of Berrien, and State of Michigan, after being first duly sworn by the sheriff, we do appraise the same at the sum set opposite each description, as follows, to wit:

Lot No. one hundred and three (103) at the sum of	15 00
Lot No. one hundred and four (104)	15 00
Lot one hundred and eleven (111)	12 00
The east sixty-six feet of lot one hundred and ninety-two (192)	8 00
Lot No. three hundred (300), sum of	3 00
Twenty-two feet west of the east twenty feet of lot No. two hundred and twenty-eight	1 00
Also three hundred and one (301)	2 00
" three hundred and two (302)	2 00
Lot No. fifty-three (53)	75
Lot No. sixty (60)	30
Lot No. sixty-nine (69)	2 00
Lot No. seventy-six (76)	2 00
Lot No. eighty-five (85)	2 00
The north thirty-seven and thirty-four one hundredths acres ($37\frac{34}{100}$) of the northwest quarter of section 2, town 4 south, of range eighteen (18) west, at the sum of	7 00

C. D. NICHOLS, [SEAL.]
JAS. M. PLATT, [SEAL.]
Appraisers.

Filed January 12th, 1874.

25 STATE OF MICHIGAN, } ss:
County of Berrien, }

By virtue of a writ of attachment hereunto annexed I have this day levied upon and attached the following-described real estate, lying and being in the county of Berrien, and State of Michigan, to wit: Lots No. one hundred and three (103), one hundred and four (104), one hundred and eleven (111), and the east sixty-six feet of lot one hundred and ninety-two (192), lots three hundred (300), twenty-[two] (22) feet west of east twenty feet of lot No. two hundred and twenty-eight (228), also three hundred and one (301), three hundred and two (302), all in the village of St. Joseph, according to the recorded plat thereof; also University lots No. fifty-three (53), sixty (60), sixty-nine (69), seventy-six (76), and eighty-five (85), in section twenty-six, town four (4) south, of range nineteen (19) west; also the north thirty-seven and thirty-four one-hundredths ($37\frac{34}{100}$) acres of the northwest quarter of section two (2), town four (4) south, of range eighteen (18) west, all in Berrien county, Michigan.

Dated January 12th, A. D. 1874.

JOSEPH W. WEIMER, *Sheriff.*

Filed January 12th, 1874.

26 STATE OF MICHIGAN:

The Circuit Court for the County of Berrien. April 14th, 1874.

DANIEL CHAPMAN
vs.
BENJAMIN C. HOYT and ENOCH C. HOYT, Copartners under the firm name of B. C. Hoyt & Son.

On reading and filing due proof of personal service on the defendant, Benjamin C. Hoyt, of the writ of attachment issued in the above entitled cause, and that the declaration in said cause was duly filed within the time limited for the filing of the same, and that more than ten days having elapsed since the expiration of the time so limited for filing the declaration in said cause, and the said defendant, Benjamin C. Hoyt, has not appeared, plead, answered, or demurred in the cause, nor has there been any appearance, plea, or demurrer served on the plaintiff's attorney, or the plaintiff, it is ordered that the default of the said defendant, Benjamin C. Hoyt, for want of an appearance, be, and the same is hereby, entered.

POTTER & POTTER,
Attorneys for Plaintiff.

Filed April 14th, 1874.

27 STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

DANIEL CHAPMAN
vs.
BENJAMIN C. HOYT and ENOCH C. HOYT, Copartners under the firm name of B. C. Hoyt & Son.

STATE OF MICHIGAN, } *ss:*
County of Berrien, }

Daniel Chapman, of Berrien Springs, in said county, being duly sworn, says: That he is plaintiff in this cause, and that the same was commenced by writ of attachment issued out of and under the seal of this court, dated the 12th day of January, A. D. 1874, and returnable on the 3rd day of March, A. D. 1874. Deponent further says that said defendants, Benjamin C. Hoyt and Enoch C. Hoyt, were copartners under the firm name of B. C. Hoyt & Son on the 29th of December, A. D. 1870, and prior thereto, and so continued copartners up to the time of and subsequent to the commencement of this suit, and that as such copartners, and during said time, they were engaged in the banking business, as bankers, in St. Joseph, in said county; that this suit is brought to recover upon several certificates of deposit or promissory notes, which were given by said defendants for moneys deposited with them by deponent, copies of all of which are set forth in the declaration filed in this cause, and for monies deposited with said defendants as bankers and copartners as aforesaid by this deponent, and the same are the only causes of action embraced in this suit.

28 Deponent further says the writ of attachment in this cause was personally served upon said defendant, Benjamin C. Hoyt, at said county of Berrien, on the 3rd day of March, A. D. 1874, but that the same was never served upon said defendant, Enoch C. Hoyt; that the said defendant, Enoch C. Hoyt, departed this life at said county of Berrien on the 25th day of February, A. D. 1874. This deponent prays that a suggestion may be entered on the record in this cause as to the death of said defendant, Enoch C. Hoyt, and that this action may — against the said defendant, Benjamin C. Hoyt, pursuant to the statutes.

DANIEL CHAPMAN.

Subscribed and sworn to before me, this 16th day of April, 1874.
D. E. HINMAN, *Clerk.*

Filed April 16th, 1874.

Suggestion of Death of Defendant, Enoch C. Hoyt.

At a general term of the circuit court for the county of Berrien, continued and held at the court-house in the village of Berrien Springs, in said county, on the 16th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Present: Honorable Henry H. Coolidge, circuit judge.

DANIEL CHAPMAN
vs.
BENJAMIN C. HOYT & ENOCH C. HOYT, Copartners under the firm name of S. C. Hoyt & Son.

And now at this day, to wit, the 16th day of April, A. D. 1874, before the said circuit judge for the county of Berrien, comes the said Daniel Chapman, by Potter & Potter, his attorneys. On reading and filing the affidavit of said Daniel Chapman, showing, among
29 other things, the death of Enoch C. Hoyt, one of the above defendants, thereupon, according to the form of the statutes in such case made and provided it is suggested to the said circuit court now here and said plaintiff gives the said court to understand and be informed, that since the issuing of the writ of attachment in this cause as commencement of this suit, under the rules and practice of this court, and before this, to wit, on the 25th day of February. A. D. 1874, Enoch C. Hoyt, one of the defendants in this cause, died, to wit, at St. Joseph, in said county of Berrien and State of Michigan.

On motion of Potter & Potter, attorneys for said plaintiff, ordered by the circuit court now here that said action proceed against the surviving defendant, Benjamin C. Hoyt, in pursuance of the statutes and the rules of practice of this court.

HENRY H. COOLIDGE,
Circuit Judge.

Filed April 16th, 1874.

30 At a general term of the circuit court for the county of Berrien, continued and held at the court-house, in the village of Berrien Springs, on Friday, the 8th day of May, A. D. 1874.

Present: Hon. Henry H. Coolidge, circuit judge.

The court opened for business in due form.

DANIEL CHAPMAN
vs.
BENJAMIN C. HOYT and ENOCH C. HOYT, Copartners, firm name of B. C. Hoyt & Son. } Assumpsit.

The appearance of the said defendant, Benjamin C. Hoyt, and his default in not pleading having been duly entered in this cause according to the rules and practice of this court, and the said default having become absolute (and the suggestion of the death of Enoch C. Hoyt, the other defendant, having been duly entered of record), and the damages of the said plaintiff on occasion of the pursuance having been duly assessed at the sum of four thousand nine hundred thirty dollars and fifteen cents over and above his costs and charges by him about his suit in their behalf expended, therefore it is considered that the said plaintiff do recover against the said defendant, Benjamin C. Hoyt, his damages, together with his costs and charges aforesaid, to be taxed, and that the said plaintiff have execution thereof.

HENRY H. COOLIDGE,
Circuit Judge.

Filed May 8th, 1874.

31 *Default Absolute.*

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien. Dated 8th May, A. D. 1874.

Parties.

DANIEL CHAPMAN

vs.

BENJAMIN C. HOYT & ENOCH C. HOYT, Copartners under the firm name of B. C. Hoyt & Son.

The appearance of said defendant, Benjamin C. Hoyt, and his default in not appearing or pleading in the cause having been duly entered, and more than one day in term having elapsed since the entry thereof, on motion of Potter & Potter, attorneys for plaintiff, it is ordered that the said default be, and the same is hereby, made absolute; that interlocutory judgment be, and the same is hereby, entered, and that the damages of the plaintiff be assessed by the court now here.

POTTER & POTTER,
Plaintiff's Attorneys.

Filed May 8th, 1874.

32 *Plaintiff's Taxed Bill of Costs.*

In the Circuit Court for the County of Berrien.

DANIEL CHAPMAN.

vs.

BENJAMIN C. HOYT & ENOCH C. HOYT, Copartners under the firm name of B. C. Hoyt & Son.

Attorney fee		$15 00
Stamp on writ		
County fee		2 00
Jury fee		
Reporter's fee		3 00
Clerk's fee		4 00
Sheriff's fee on service of writ or narr.		8 00
Commissioner's fee on holding to bail		
Issue roll, —— folios, at ten cents per folio		
Witness' fees on trial, viz:		
Daniel Chapman, —— days and —— miles travel	$0 44	
" "		
" "		
Total witness' fees		44
Sheriff's fee on service of subpœna		
Affidavit to fee bill		25
Taxation of costs		25
		$30 94

33 STATE OF MICHIGAN, } ss:
County of Berrien, }

Calvin B. Potter, being duly sworn, deposes and says that the above items of costs, charged as disbursements, have been actually paid or the liability incurred, and that the witnesses above named actually attended on the trial the number of days, and traveled the number of miles specified, respectively.

CALVIN B. POTTER.

Sworn and subscribed before me, this 8th day of May, A. D. 1874.
DAVID E. HINMAN, *Clerk.*

Taxed Bill of Costs for Pl'ff.

I hereby tax the costs of plaintiff at the sum of thirty & $\frac{94}{100}$ dollars.

Dated May 8, 1874. DAVID E. HINMAN, *Clerk.*

34 STATE OF MICHIGAN, } ss:
County of Berrien, }

The circuit court for the county of Berrien to the sheriff of the county of Berrien, Greeting:

In the name of the people of the State of Michigan, you are commanded, that of the goods of Benjamin C. Hoyt, defendant, and for want thereof, then of his lands and tenements in your bailiwick, you cause to be made the sum of four thousand nine hundred and thirty dollars and fifteen cents; which Daniel Chapman, plaintiff, lately in the circuit court for the county of Berrien aforesaid, at the court-house, in Berrien Springs, recovered against him for his damages which he had sustained on occasion of the non-performance of certain promises and undertakings, and also thirty dollars —— cents, which were awarded to the said plaintiff for his costs and charges by him about his suit in that behalf expended, whereof the said defendant stand convicted as appears of record; and have you that money before the circuit judge for the county aforesaid, at the court-house, in Berrien Springs, on the first Tuesday of August next, then and there to render to the said plaintiff for his damages and costs aforesaid, and have you then and there this writ.

Witness the Honorable Henry H. Coolidge, circuit judge, at Berrien Springs, on the 8th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] DAVID E. HINMAN, *Clerk.*

POTTER & POTTER,
Attorneys for Plaintiff.

35 STATE OF MICHIGAN, } ss:
County of Berrien, }

The circuit court for the county of berrien, to the sheriff of the county of Berrien, Greeting:

In the name of the people of the State of Michigan, as you have heretofore been commanded, you are commanded that of the goods and chattels of Benjamin C. Hoyt, defendant, and for want thereof, then of his lands and tenements in your bailiwick, you cause to be made the sum of four thousand nine hundred and thirty dollars and fifteen cents, which Daniel Chapman, plaintiff, lately in the circuit court for the county of Berrien aforesaid, at the court-house, in Berrien Springs, recovered against him for his damages which he had sustained on occasion of the non-performance of certain promises and undertakings; and also, thirty dollars & ninety-four cents, which were awarded to the said plaintiff for his costs and charges by him about his suit in that behalf expended, whereof the said defendant stand convicted as appears of record; and have you that money before the circuit judge for the county aforesaid, at the court-house, in Berrien Springs, on the first Tuesday of March next ensuing, then and there to render to the said plaintiff for his damages and costs aforesaid, and have you then and there this writ.

Witness the Honorable Henry H. Coolidge, circuit judge,
36 at Berrien Springs, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] DAVID E. HINMAN, *Clerk.*

Attorney for Plaintiff.

37 STATE OF MICHIGAN, } ss:
County of Berrien, }

By virtue of an execution, hereto annexed, issued out of and under the seal of the circuit court for the county of Berrien, I have this day levied upon the following-described real estate, lying and being in the county of Berrien and State of Michigan, to wit:

Lots No. one hundred and three (103), one hundred and four (104), one hundred and eleven (111), the east sixty feet of lot one hundred and ninety-two (192), lots three hundred (300), twenty-two feet west of the east twenty feet of lot No. two hundred and twenty-eight (228), also, lots three hundred and one (301), three hundred and two (302), all in the village of St. Joseph, according to the recorded plat thereof; also, University lots No. fifty-three (53), sixty (60), sixty-nine (69), seventy-six (76), and eighty-five (85), in section twenty-six (26), town four (4) south, of range 19 west (19); also, the north thirty-seven (37) and thirty-four one-hundredths ($\frac{34}{100}$) acres of the north-west quarter of section two (2), town four (4) south, of range eighteen (18) west, all in Berrien county, Mich.

Dated May the 8th, A. D. 1874.

JOSEPH W. WEIMER, *Sheriff.*

38 STATE OF MICHIGAN, } ss:
County of Berrien, }

By virtue of the execution hereunto annexed, I have this day levied upon the following-described real estate, lying and being in the county of Berrien, State of Michigan:

Lot sixty-five (65), in the village of St. Joseph; also lot five (5), in block forty-three (43); also block eleven (11), block twenty (20), block thirty-three (33); also lots two (2), three (3), and seven (7), in block fifty-one (51); lot five (5), six (6), and seven (7), in block fifty-two (52); all being in B. C. Hoyt's first addition to the village of St. Joseph. Also lots two (2), three (3), four (4), seven (7), and eight (8), in block fifty-eight (58); also lots one (1), two (2), and four (4), in block fifty-nine (59); also lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8), in block sixty-seven (67); also one (1), two (2), three (3), and seven (7), in block sixty-eight (68); all being in B. C. Hoyt's second addition to the village of St. Joseph.

Dated December 16th, 1874.

JAMES GRAHAM, *Under Sheriff.*

39 STATE OF MICHIGAN, } ss:
County of Berrien, }

I, David E. Hinman, clerk of the circuit court for the county of Berrien, do hereby certify that the within and foregoing are true copies of all the files and records in the within-named cause; that I have compared the same with the original files and records, and that they are a true transcript therefrom and of the whole thereof.

Witness my hand and the seal of said court, at Berrien Springs, this 24th day of October, A. D. 1876.

[L. S.] DAVID E. HINMAN, *Clerk.*

40 In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the Matter of BENJAMIN C. HOYT, Bankrupt.

WESTERN DISTRICT OF MICHIGAN, ss:

Know all men by these presents, that Joseph W. Brewer, in the village of St. Joseph, in the county of Berrien and State of Michigan, in said district, has been duly appointed assignee in said matter: Now, therefore, I, J. Davidson Burns, register in bankruptcy in said district, by virtue of the authority vested in me by the 14th section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, A. D. 1867, do hereby convey and assign to the said Joseph W. Brewer, assignee as aforesaid, all the estate, real and personal, of the said Benjamin C. Hoyt, bankrupt aforesaid, including all the property of whatever kind, of which he was possessed, or in which he was interested or entitled to have on the tenth day of October, A. D. 1873, with all his deeds, books, and papers relating thereto, except-

ing such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act; to have and to hold all the foregoing premises to the said Joseph W. Brewer, and his heirs, forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness thereof, I, the said register, have hereunto set my hand and caused the seal of said court to be affixed, this first day of October, A. D. 1874.

[SEAL.] J. DAVIDSON BURNS,
Register in Bankruptcy.

THE UNITED STATES OF AMERICA, }
Western District of Michigan, } *ss:*

I, Chester B. Hinsdill, clerk of the district court of the United States for the said district, hereby certify that the foregoing is a true copy of the assignment of effects in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court, at Grand Rapids, this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] CHESTER B. HINSDILL, *Clerk.*
A. B. CARRIER, *Deputy.*

41 [Endorsed:] Complainant's Exhibit "A" in Brewer, compl't, *vs.* Chapman *et al.* Chester B. Hinsdill, U. S. commissioner, west. dist. Michigan. No. 322. The district court of the United States for the western district of Michigan. In the matter of Benjamin C. Hoyt, bankrupt. Assignment of bankrupt effects. Register's office, Berrien county, *ss:* Received and recorded the 14th day of December, A. D., 1874, at 1½ hour p. m., in liber No. 1, Miscellaneous Record, page 640. Roscoe D. Dix, deputy register. J. W. Brewer, St. Joseph, Mich.

42 *Defendants' Proof.*

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Compl't,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Def'ts.

On this 20th day of October, A. D. 1876, the solicitors for the respective parties appeared to take further proof in this case.

Mr. C. B. Potter, counsel for defendants, offered in evidence a certified transcript of a judgment record in the circuit court for the county of Berrien in the case of Daniel Chapman, plaintiff, against Benjamin C. Hoyt, defendant, hereto annexed, and marked Exhibit "B."

The complainant's solicitor objects to the introduction of this testimony, as being irrelevant and immaterial.

43 In the Circuit Court of the United States for the Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Compl't,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, & JAMES GRAHAM, Def'ts.

In this cause the complainant having, on this 19th day of July, A. D. 1876, appeared before me by Messrs. Eggleston & Kleinhans, his solicitors, and the defendants by C. B. Potter, Esq., their solicitor, for the purpose of examining witnesses on behalf of said complainant, thereupon the following proceedings were had:

JOSEPH W. BREWER, a witness produced on behalf of the complainant, and being by me first duly sworn, deposes and testifies as follows:

My name is Joseph W. Brewer; I reside at St. Joseph, Michigan, and am 62 years of age; I am justice of the peace and real estate dealer, and I am the complainant in this cause.

I have been acting as assignee in the matter of Benjamin C. Hoyt, a bankrupt, since the 3rd day of October, A. D. 1874.

I am acquainted with the property in controversy in this cause.

I was in possession as much as I could be under the circumstances.

I have had the general care of it, and have paid the taxes on it.

44 According to my recollection, there is only one building on the premises, and that I am in possession of.

I have had the management and custody of this property, and have paid the taxes on it since October 10th, A. D. 1874.

I think that the property in controversy is worth about $10,000.

I know the defendants in this cause.

Joseph W. Weimer has been acting as sheriff of Berrien county, Michigan, continuously from the 1st of January, 1873, to the present time, and during the same time James Graham has been acting as his under-sheriff.

The complainant's solicitor now offers in evidence a certified copy of the assignment of effects of Benjamin C. Hoyt, a bankrupt, to Joseph W. Brewer, which is received, and herewith returned marked Exhibit "A."

The defendant's solicitor desires to say that he does not wish to cross-examine the witness.

JOSEPH W. BREWER.

Subscribed and sworn to before me, this 19th day of July, A. D. 1876.

CHESTER B. HINSDILL,
Special Examiner.

45 [Endorsed:] No. 125. U. S. circuit court, west. dist. of Mich. In equity. Joseph W. Brewer, assignee, *vs.* Daniel Chapman *et al.* Deposition of Joseph W. Brewer. Filed Aug. 15th, '76. Chester B. Hindsdill, clerk.

46 The Circuit Court of the United States for the Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee, &c., Compl't,
vs.
DANIEL CHAPMAN, JOSEPH WEIMER, and JAMES GRAHAM, Def'ts.

We hereby consent that an order be entered in this case substituting Blair, Eggleston, Kingsley & Kleinhans as the solicitors of record for the said complainant in place of the undersigned.

EGGLESTON & KLEINHANS,
Compl't's Sol'rs.

Dated Sep. 27, 1877.

[Endorsed:] No. 125, B. U. S. circuit court, west. dist. Mich. Equity. Joseph Brewer, assignee, *vs.* Daniel Chapman *et al.* Stipulation. Received and filed Sept. 28th, 1877. C. B. Hinsdill, clerk.

47 The United States Circuit Court for the Sixth Circuit and Southern Division of the Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee, &c., Compl't,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Def'ts.

We hereby consent that an order be entered in this case substituting Blair, Kingsley, & Kleinhans as the solicitors of record for the said complainant in place of the undersigned.

BLAIR, EGGLESTON, KINGSLY & KLEINHANS,
Compl't's Sol'rs.

Dated Sept. 26, 1878.

[Endorsed:] No. 125, B. U. S. circuit court, western dist. of Michigan. In equity. Joseph W. Brewer, assignee, complainant, *vs.* Daniel Chapman *et al.*, def't. Stipulation—substitution. Filed Sept. 26th, '78. C. B. Hinsdill, clerk. Blair, Kingsley, & Kleinhans, compl't's sol'rs.

48 In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. September 26th, 1878.

JOSEPH W. BREWER, Assignee, &c., Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants. } In Equity.

On reading and filing the stipulation of Blair, Eggleston, Kings-

ley, & Kleinhans, solicitors for the complainant in this cause, and on their motion—

Ordered, That Blair, Eggleston, Kingsley, & Kleinhans be, and are, substituted as solicitors of record for the complainant herein.

BLAIR, EGGLESTON, KINGSLEY & KLEINHANS,
Compl't's Sol'rs.

49 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Southern Division of the Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Complainant,

vs.

DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective solicitors, that at any time, either ten days from the date of this stipulation, and without further notice thereof, the complainant may produce and offer in evidence as part of his proof, before Chester B. Hinsdill, one of the masters and examiners of this court, the documentary evidence hereto attached, which consists of certified copies of the following files and records in the matter of Benjamin C. Hoyt, a bankrupt, in the district court of the United States for the western district of Michigan, in bankruptcy, viz:

(1.) The petition filed by John Whittlesey on the 10th day of October, 1873, for an adjudication of bankruptcy against Benjamin C. Hoyt and Enoch C. Hoyt.

(2.) An amended petition, filed by the said John Whittlesey on the 5th day of March, 1874, for an adjudication in bankruptcy against the same parties.

(3.) An order suggesting the death of Enoch C. Hoyt, and directing further proceedings to be continued against Benjamin C. Hoyt, survivor, &c.

50 (4.) A denial of bankruptcy, filed by said Benjamin C. Hoyt, to the petition of the said John Whittlesey.

(5.) An adjudication of bankruptcy made against the said Benjamin C. Hoyt on the first day of June, 1874.

It is further stipulated that the defendants may offer in evidence in like manner, as part of their proof, such other of the files and records in said bankruptcy proceedings as they may desire, or deem pertinent to this defense, by giving ten days' written notice thereof to the complainant's solicitors, if they require it, before the final hearing.

Dated 3rd March, 1879.

BLAIR, KINGSLEY & KLEINHANS,
Compl't's Solicitors.

C. B. POTTER,
Solicitor for Defendants.

51 To the Hon. Solomon L. Withey, judge of the district court of the United States for the western district of Michigan:

The petition of John Whittlesey, of the township of St. Joseph, in the county of Berrien and State of Michigan, respectfully shows: That he is a creditor of Benjamin C. Hoyt and Enoch C. Hoyt, partners in the banking business, under the firm name and style of B. C. Hoyt & Son, who, for a period of more than two years next preceding the date of the filing of this petition, have resided at St. Joseph, in the county of Berrien and State of Michigan and district aforesaid; that your petitioner's demand is provable against the said B. C. Hoyt & Son, partners as aforesaid, in accordance with the provision of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867; that he believes that the said B. C. Hoyt & Son, partners as aforesaid, owe debts to an amount exceeding the sum of three hundred dollars; that your petitioner's demand exceeds the amount of two hundred and fifty dollars; and that the nature of your petitioner's demand against the said B. C. Hoyt & Son is as follows:

A certain promissory note signed by the said B. C. Hoyt & Son, payable to the order of John Whittlesey, Esq., of which the following is a copy, to wit:

SAINT JOSEPH, *April 3d*, 1873.

On demand, after date, we promise to pay to the order of John Whittlesey, Esq., fourteen hundred dollars, at our office in St. Joseph, value received, with interest at ten per cent., payable semi-annually.

$1,400.00. B. C. HOYT & SON.

And your petitioner further represents that within six calendar months next preceding the date of this petition the said B. C. Hoyt & Son, partners as aforesaid, did commit an act
52 of bankruptcy within the meaning of the said act, to wit, in that the said B. C. Hoyt & Son, within the period aforesaid, and within said district, to wit, on the twenty-sixth day of September, A. D. 1873, being bankers, have fraudulently stopped payment of their commercial paper within a period of fourteen days; your petitioner having, on the said twenty-six day of September, 1873, demanded of the said B. C. Hoyt & Son payment of said note, which payment they have fraudulently stopped within the period aforesaid.

And your petitioner further represents that within six months next preceding the date of this petition the said B. C. Hoyt & Son, partners as aforesaid, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said B. C. Hoyt & Son, partners as aforesaid, within the period aforesaid and within said district, to wit, on the twenty-six day of September, 1873, being bankers, have suspended and not resumed payment of their commercial paper within a period of fourteen days, your petitioner having on the twenty-sixth day of September, 1873, demanded payment of the said B. C. Hoyt & Son of the aforesaid note, the payment of which has

been suspended and not resumed by the said B. C. Hoyt & Son within a period of fourteen days.

Wherefore your petitioner prays that they, the said Benjamin C. Hoyt and Enoch C. Hoyt, partners as aforesaid, may be declared bankrupts, and that a warrant may be issued to take possession of their estate; that the same may be distributed according to law, and that such further proceedings may be had therein as the law in such cases prescribes.

JOHN WHITTLESEY, *Petitioner.*

A. F. JUDSON, *Attorney.*

53 UNITED STATES OF AMERICA, }
Western District of Michigan, } *ss:*

I, John Whittlesey, the petitioner above named, do hereby make solemn oath that the statement contained in the foregoing petition subscribed by me are true, so far as the sums are stated of my own knowledge, and that those matters which are stated therein on information and belief are true, according to the best of my knowledge, information, and belief.

JOHN WHITTLESEY.

Subscribed and sworn to before me, this 9th day of October, A. D. 1873.

GEO. S. CLAPP,
U. S. Commissioner.

[Endorsed:] In the district court of the United States for the western district of Michigan. *In re* Benjamin C. Hoyt & Enoch C. Hoyt. Petition for adjudication in bankruptcy. In bankruptcy. Rec'd and filed this 10 day of October, A. D. 1873, Isaac H. Parrish, clerk, by Horace Tompkins, deputy. Received deposit, 15. Isaac H. Parrish, clerk.

54 To the Hon. Solomon L. Withey, judge of the district court of the United States for the western district of Michigan:

The petition of John Whittlesey, of the township of St. Joseph, in the county of Berrien and State of Michigan, respectfully shows: That he is a creditor of Benjamin C. Hoyt and Enoch C. Hoyt, partners in the banking business, under the firm name and style of B. C. Hoyt & Son, who, for a period of more than two years next preceding the date of the filing of this petition, have resided at St. Joseph, in the county of Berrien and State of Michigan and district aforesaid; that your petitioners demand is provable against the said B. C. Hoyt & Son, partners as aforesaid, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867.

That he believes that the said B. C. Hoyt & Son, partners as aforesaid, owes debts to the amount exceeding the sum of three hundred dollars. That your petitioner's demand exceeds the sum of two hundred and fifty dollars, and that the nature of your petitioner's

demand against the said B. C. Hoyt & Son is as follows: A certain promisory note signed by the said B. C. Hoyt & Son, payable to the order of John Whittlesey, Esq., of which the following is a copy, to wit:

SAINT JOSEPH, *April 3d*, 1873.

On demand, after date, we promise to pay to the order of John Whittlesey, Esq., fourteen hundred dollars, at our office in St. Joseph, value received, with interest at ten per cent., payable semi-annually.

$1,400.00 B. C. HOYT & SON.

And your petitioner further represents that within six calendar months next preceding the date of this petition the said B. C. Hoyt & Son, partners as aforesaid, did commit an act of bankruptcy
55 within the meaning of the said act, to wit: In that the said B. C. Hoyt & Son within the period aforesaid and within said district, to wit, on the twenty-sixth day of September, A. D. 1873, being bankers, have fraudulently stopped payment of their commercial paper within a period of fourteen days, and not resumed payment within said period, your petitioner having, on the said twenty-sixth day of September, A. D. 1873, at their office, in St. Joseph aforesaid, demanded of the said B. C. Hoyt & Son payment of said note, which payment they have fraudulently stopped and not resumed within the period aforesaid.

And your petitioner further represents that within six months next preceding the date of this petition the said B. C. Hoyt and Son, partners as aforesaid, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said B. C. Hoyt and Son, partners as aforesaid, within the period aforesaid, and within said district, to wit, on the 26th day of September, A. D. 1873, being bankers, have suspended and not resumed payment of their commercial paper within a period of fourteen days, your petitioner having, on that 26th day of September, A. D. 1873, at their office, in St. Joseph aforesaid, demanded payment of the said B. C. Hoyt and Son of the aforesaid note, the payment of which has been suspended and not resumed by the said B. C. Hoyt and Son within a period of fourteen days.

Wherefore your petitioner prays that they, the said Benjamin C. Hoyt and Enoch C. Hoyt, partners as aforesaid, may be declared bankrupts, and that a warrant may be issued to take possession of their estate, and that the same may be distributed according to law, and that such further proceedings may be had thereon as the law in such cases prescribe.

JOHN WHITTLESEY.

56 UNITED STATES OF AMERICA, }
Western District of Michigan, } *ss:*

I, John Whittlesey, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed are true so far as the sums are stated of my own knowl-

edge, and that those matters which are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

JOHN WHITTLESEY.

Subscribed and sworn to before me, this 3d day of March, A. D. 1874.

GEO. S. CLAPP,
United States Commissioner.

[Endorsed:] U. S. district court for the western district of Michigan. In the matter of Benjamin C. Hoyt, Enoch C. Hoyt, alleged bankrupts. Amended petition. Filed March 5th, 1874, at 9 o'clock a. m. Isaac H. Parrish, clerk.

57 WESTERN DISTRICT OF MICHIGAN, *ss:*

In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the Matter of BENJAMIN C. HOYT and ENOCH C. HOYT, against whom Petitions for an Adjudication in Bankruptcy has been filed.

On reading and filing the affidavit of Jacob Kleinhans, showing that the above named Enoch C. Hoyt has departed this life since the commencement of the proceeding in said matter, and on motion of Eggleston and Kleinhans, solicitors for the petitioning creditors, Messrs. Hughes, O'Brien, and Smiley, sol'rs for the alleged bankrupts, appearing and consenting thereto, it is ordered that the death of said Enoch C. Hoyt be, and the same is hereby, suggested on the record of said proceedings.

It is further ordered that all proceedings in this cause do stand against said Benjamin C. Hoyt, survivor of himself and said Enoch C. Hoyt, and that said proceedings may be prosecuted against said Benjamin C. Hoyt, survivor as aforesaid, with like force and effect as if said Enoch C. Hoyt had not died. It is further ordered that the marshal surrender to the proper representatives of said Enoch C. Hoyt, deceased, all the individual property of said Enoch C. Hoyt, deceased, now in the possession of said marshal.

Witness the Honorable Solomon L. Withey, judge of said
58 court, and the seal thereof, at Grand Rapids, in said district, on the 2d day of May, 1874.

[SEAL.] ISAAC H. PARRISH, *Clerk.*

Copy.

[Endorsed:] U. S. district court for the western district of Michigan. In the matter of Benjamin C. Hoyt, an alleged bankrupt. Order to continue proceedings against B. C. Hoyt. Rec'd and filed May 2, 1874. Isaac H. Parrish, clerk.

59 WESTERN DISTRICT OF MICHIGAN, *ss:*

In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the Matter of the Petition of JOHN WHITTLESEY, Petitioning Creditor,

vs.

BENJAMIN C. HOYT, Surviving, etc., alleged bankrupt.

At the city of Grand Rapids, in said district, on the 2d day of May, A. D. 1874.

And now the said Benjamin C. Hoyt appears and denies that he has committed the act of bankruptcy set forth in said petition, and avers that he should not be declared bankrupt for any cause in said petition alleged, and he demands that the same be inquired of by a jury.

BENJAMIN C. HOYT,
By HUGHES, O'BRIEN & SMILEY,
His Attorneys.

Witness the Honorable Solomon L. Withey, judge of said court, and the seal thereof, at the city of Grand Rapids, in said district, on the 2d day of May, A. D. 1874.

60 [Endorsed:] The district c't of the U. S. for the W. dist. of Mich. In bankruptcy. In the matter of the petition of John Whittlesey, petitioning cred., *vs.* Benjamin C. Hoyt, survivor, &c., alleged bankrupt. Denial of bankruptcy. Filed May 2, 1874. Isaac H. Parrish, clerk. Hughes, O'Brien & Smiley, att'ys for Benjamin C. Hoyt.

61 *Adjudication of Bankruptcy on Creditor's Petition.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the Matter of BENJAMIN C. HOYT, against whom a Petition in Bankruptcy was filed on the 19th day of October, A. D. 1873. At Grand Rapids, in said district on the first day of June, A. D. 1874. Before Hon. Solomon L. Withey, district judge.

This matter came on to be heard at Grand Rapids, in said court, and the respondent having withdrawn his denial and demand for a jury, and having, by his attorneys, Hughes, O'Brien & Smiley, consented thereto.

And thereupon, and upon consideration of the proofs in said matter, it was found that the facts set forth in said petition were true, and it is therefore adjudged that Benjamin C. Hoyt became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United

States," approved March 2, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly. And it is further ordered that the said bankrupt shall, within five days after this order, make and deliver, or transmit by mail, postpaid, to the marshal, as messenger, a schedule of his creditors, and inventory of his estate, in the form and verified in the manner required of the petitioning debtor by the said act.

Witness the honorable Solomon L. Withey, judge of the said district court, and the seal thereof, at Grand Rapids, in said
62 district, on the 1st day of June, A. D. 1874.

[SEAL.] ISAAC H. PARRISH,
Copy. *Clerk of District Court for said District.*

By ——— ———, *Deputy.*

63 THE UNITED STATES OF AMERICA, }
Western District of Michigan, Southern Division. } *ss:*

I, Chester B. Hinsdill, clerk of the district court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the petition for adjudication filed Oct. 10, 1873, copy of amended petition, order continuing proceedings, denial of bankruptcy by B. C. Hoyt, and adjudication of bankruptcy on file in the proceedings of said court in said entitled matter.

Witness my official signature and the seal of said court, in Grand Rapids, this 18th day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

[L. S.] CHESTER B. HINSDILL, *Clerk*,
By A. B. CARRIER, *Deputy.*

[Endorsed:] Copy. Circuit court of the United States, western district of Michigan. In bankruptcy. In the matter of Benjamin C. Hoyt, a bankrupt. Adjudication, on creditor's petition, entered this 1st day of June, A. D. 1874. Isaac H. Parrish, clerk of district court for said district.

64 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division. In Equity.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Complainant,

vs.

DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

On this 12th day of March, 1879, appeared before me, at my office, in the city of Grand Rapids, Mich., Messrs. Blair, Kingsly & Kleinhans, solicitors for the complainant, and then produced and offered in evidence, on behalf of complainant, a stipulation in writing in

the above-entitled cause bearing date March 3rd, 1879, and the documentary evidence thereto attached and mentioned in said stipulation, which stipulation and documentary evidence was received by me and is herewith returned, marked Exhibit "C."

Dated March 12, '79.

CHESTER B. HINSDILL,
Master in Chancery.

65 [Endorsed:] No. 125. U. S. cir. c't, west. dist. Mich. In eq. J. W. Brewer, assignee, compl't, *vs.* Daniel Chapman *et al.*, def'ts. Report of C. B. Hinsdill, master in chancery. Filed March 12th, '79. H. M. Hinsdill, clerk.

66 *Notice of Trial.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America for the Sixth Circuit and Southern Division of the Western District of Michigan. In Equity.

JAMES W. BREWER, Assignee of Benjamin C. Hoyt, a Bankrupt,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM,
Defendants.

SIR: Please take notice that the above-entitled cause will be brought on for hearing on pleadings and proofs, then at the next term of said court, to be held at the place of holding said court, in the city of Grand Rapids, in said district, on the second day of March, A. D. 1880, at the opening of court on that day, or as near thereafter as counsel can be heard.

Dated February 16th, 1880.

Yours, &c.,

BLAIR, KINGSLEY & KLEINHANS,
Sol'rs for Compl't.

To C. B. POTTER, Esq., *Sol'r for Def'ts.*

UNITED STATES OF AMERICA, }
Western District of Michigan, } *ss:*

George Gray, Junior, being duly sworn, deposes and says, that on the 16th day of February, 1880, he served a notice, of which the above is a true copy, on C. B. Potter, Esquire, solicitor for the defendants in the above-entitled cause, by mailing the same at Grand Rapids, Michigan, in an envelope, securely sealed, postage prepaid, and addressed to said C. B. Potter, St. Joseph, Mich., where he then resided.

GEO. GRAY, JR.

Subscribed and sworn to before me, this 8th day of April, A. D. 1880.

VAN E. YOUNG,
Notary Public for Kent County, Mich.

67 [Endorsed:] No. 125, B. U. S. circuit court for the western district of Michigan. In equity. Joseph W. Brewer, assignee, &c., *vs.* Daniel Chapman *et al.* Notice of trial. Filed April 10th, 1880. H. M. Hinsdill, clerk. Blair, Kingsley & Kleinhans, compl't's sol'rs.

68 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Southern Division of the Western District of Michigan. In Equity.

At a session of said court, held at the court-room, in the city of Grand Rapids in said district, on Saturday, the 15th day of April, A. D. 1880.

Present: Hon. S. L. Withey, district judge.

JOSEPH W. BREWER, Assignee of the Estate and Effects of Benjamin C. Hoyt, a Bankrupt, Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Def'ts.

This cause came on to be heard at this term, and was argued by counsel for the complainant, no one appearing for the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

First. That said Benjamin C. Hoyt, at the date of the filing of the petition in bankruptcy against him, namely, on the 10th day of October, 1873, was the owner in fee of the following-described lands, situated in the county of Berrien and State of Michigan and in the western district of Michigan aforesaid, viz: Lot one hundred and eleven (111), the east sixty feet of lot number one hundred and ninety-two (192), and twenty-two (22) feet west of the east
69 twenty (20) feet of lot number two hundred and twenty-eight (228), all in the village of St. Joseph, in said county, according to the recorded plat thereof; also the north thirty-seven & thirty-four one-hundredths acres of the northwest quarter of section two (2), in town four (4) south, of range eighteen (18) west, in said county.

Second. That said Benjamin Hoyt, on said 10th day of October, 1873, was also the owner in fee of the following-described lands, situate in said county of Berrien, viz: Lot five (5), in block forty-three (43); also block eleven (11), block twenty (20), block thirty-three (33); also lots two (2), three (3), and seven (7), in block fifty-one (51); lots five (5), six (6), and seven (7), in block fifty-two (52), all being in B. C. Hoyt's first addition to the village of St. Joseph aforesaid; also lots two (2), three (3), four (4), seven (7), and eight (8), in block fifty-

eight (58); lots one (1), two (2), and four (4), in block fifty-nine (59); lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8), in block sixty-seven (67); lots one (1), two (2), three (3), and seven (7), in block sixty-eight (68), all being in B. C. Hoyt's second addition to said village of St. Joseph.

Third. That said complainant, as assignee as aforesaid, succeeded to all the right, title, and interest in and to the lands mentioned in the first and second paragraphs of this decree which said Benjamin C. Hoyt had on said 10th day of October, 1873, and is, and at the time of filing his bill in this cause was, the owner in fee and in the actual possession of said lands.

Fourth. That the levies on said lands described in the first paragraph of this decree by the said defendant, Joseph W. Weimer, as sheriff of said county of Berrien, under an execution issued out of the circuit court for said county, upon a judgment recovered
70 therein on the eight day of May, 1874, by the said Daniel Chapman against said Benjamin C. Hoyt for four thousand nine hundred and thirty dollars and fifteen cents, and costs of suit taxed at thirty dollars and ninety-four cents, was and is a cloud upon the title of the complainant, as assignee as aforesaid, to said lands, and was and is entirely void and of no effect as against said assignee.

Fifth. That the levy on said lands described in the second paragraph of this decree by said defendant, James Graham, as under sheriff of said county, under an execution issued out of said circuit court upon the same judgment, was and is a cloud upon the title of the complainant, as assignee as aforesaid, to said lands, and was and is entirely void and of no effect as against said assignee.

Sixth. That said defendants, within fifteen (15) days from the date of this decree, execute, acknowledge, and deliver to said complainant, as assignee as aforesaid, a release of all their right, title, and interest in and to said lands under said levies, and upon their failure so to do, that this decree shall have all the force and effect of such release and may be recorded in the office of the register of deeds for said county of Berrien.

Seventh. That said defendants be, and they hereby are, perpetually enjoined from selling, disposing of, or interfering with said lands, under and in virtue of said levies, and from making any new or further levies on said lands, or any part thereof, under said judgment, and a writ of injunction may be issued out of and under the seal of this court enjoining them accordingly.

Eighth. That the complainant recover of the defendants
71 his costs and charges by him in and about this suit incurred or expended, to be taxed, and that he have execution thereof.

S. L. WITHEY,
Dist. Judge.

[Endorsed:] 125, B. U. S. circuit court, west. dist. of Mich. In equity. Joseph W. Brewer, assignee, &c., compl't, *vs.* Daniel Chapman *et al.*, def'ts. Decree. Entered Journal "F," p. 34, April 15th, 1880. Filed April 15th, 1880. H. M. Hinsdill, clerk.

72 The Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, in Bankruptcy, Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

WESTERN DISTRICT OF MICHIGAN, } *ss:*
County of Kent, }

C. B. Potter, of St. Joseph, in said district, being duly sworn, says that he has read the petition of said Daniel Chapman, to which this is annexed, and knows the contents thereof, and that the deponent has personal knowledge of the matters therein stated, as having been on the information of said petitioner, by this deponent, and that such matters are true in substance and in fact. That this deponent relied upon the said Severens to appear at the hearing, and argue the case for the defense, and fully expected he would do so, and had himself, therefore, made no preparation to argue the same, and did not expect to personally take part in said hearing; and this deponent further says that, after receiving said letter from the solicitors for the complainant, this deponent supposed that either said Severens would appear, on the 10th of April, in said court, and argue said cause for the defense, or that some arrangement would be made for a hearing on some other day; and that this deponent had no intention or expectation that said cause would be brought on for hearing without a presentation of the defense by the argument of counsel.

73

C. B. POTTER.

Subscribed and sworn to this 16th day of April, A. D. 1880, before me—

JOHN McQUEWAN,
Notary Public, Kent Co., Mich.

74 The Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

JOSEPH W. BREWER, Assignee in Bankruptcy of Benjamin C. Hoyt, Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

WESTERN DISTRICT OF MICHIGAN, } *ss:*
County of Kent, }

Henry F. Severens, of Kalamazoo, in said district, being duly sworn, deposes and says that he has read the petition of Daniel Chapman, to which this is annexed, and that as to those matters therein stated on information from this deponent such matters are

true; that on the morning of the 5th of April, inst., the deponent left home, and was absent in Allegan county until the evening
75 of the 10th instant, and then, for the first time, found the letter of complainant's solicitors, referred to in said petition, enclosed in an envelope addressed to this deponent by C. B. Potter, Esq., which envelope had until then remained unopened; that the wife of the deponent, who usually opened the letters of the deponent in his absence and transmitted information to him of such as were important, was also absent from home during the whole time between the 5th and 10th of April, inst.; that the deponent left word with his son to forward to the deponent any mail received at Kalamazoo for this deponent by the 8th of April to Sherman, where this deponent was, the deponent overlooking the fact that, while the railroad and telegraph station was named Sherman, the post office was called Bravo, and this deponent was afterwards informed by his said son that the direction about forwarding deponent's mail as aforesaid could not be understood, as there was no such post office in
76 Allegan county as Sherman, and his said son knew no such place *place* as Bravo, which information deponent believes true.

This deponent also says that he fully expected and intended to argue said cause for the defense when it should come on for hearing.

HENRY F. SEVERENS.

Subscribed and sworn to this 16th day of April, A. D. 1880, before me—

CHESTER B. HINSDILL,
U. S. Commissioner Western District of Michigan.

77 BLAIR, KINGSLEY & KLEINHANS, ATTORNEYS,
GRAND RAPIDS, MICH., *March* 27, 1880.

C. B. POTTER, Esq., *St. Joseph, Mich.*

DEAR SIR: We have arranged with Judge Withey to take up the three cases of Brewer, assignee, against your clients, on April 10.

The judge is going South about April 20, and as our folks are anxious to have the cases heard at once, as it is not likely he can give us any time after about April 10 until summer, and perhaps fall.

We are therefore urgent for a hearing on the day named, and hope you can make that time convenient for you.

Yours truly, BLAIR, KINGSLEY & KLEINHANS.

78 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, in Bankruptcy, Complainant,

vs.

DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM, Defendants.

To the judges of said court:

Your petitioner, Daniel Chapman, one of the defendants in the above-entitled cause, respectfully represents to your honors that he has a just and meritorious defence upon the merits in said cause, as he is advised by his counsel, C. B. Potter and H. F. Severens, to whom he has fully and fairly stated his defence, and the facts of the case in said cause, and as he verily believes.

79 Your petitioner further shows that he has always expected that the said cause would be heard upon the merits, and argued by counsel in the defence thereof upon the hearing of the same before the court.

That he employed Mr. C. B. Potter to represent him and look after the said cause in his behalf.

That through the said Potter he employed Mr. H. F. Severens, of Kalamazoo, to argue the said cause on the part of the defence when the same should come on for hearing, and relied upon said Severens to do so.

That he is informed by said Potter that an arrangement was made by him, said Potter, and the solicitors for the complainant that said last-named solicitors should notify said Severens of the time when the said cause would be taken up for argument before the court, and that he, said Potter, notified said solicitors of the aforesaid employment of said Severens; that in fact said solicitors gave no notice of such hearing to said Severens of any kind; that they did,

80 however, on or about the last day of March, write to said Potter a letter, which is hereto attached as an exhibit, being the letter bearing that date.

That said Potter at once, on the reception thereof, transmitted the said letter by mail, in a letter addressed to said Severens, at Kalamazoo, together with a request that said Severens would attend on the 10th day of April, inst., and argue said cause before said court on the part of the defence.

That he is informed by said Severens that he, said Severens, left home on the morning of Monday, the 5th day of April, inst., and did not return to Kalamazoo until the evening of the 10th of said month, until which time the said Severens did not receive the said letter so written by said solicitors for complainant, and had no notice or knowledge that the said cause was set for hearing, or expected to be heard on that day, which information from said Severens and Potter this petitioner believes true.

81 And your petitioner shows that he has been, without any intention on his part, deprived of the presentation of the defence by his counsel on the hearing of said cause.

He makes the bill, answer, and the other files and records in this cause, a part of this his petition, and prays that the said cause may be reheard upon the merits thereof, or for such further or other order as to the court shall seem meet in the premises.

And your petitioner will ever pray, &c.

DANIEL CHAPMAN.

UNITED STATES OF AMERICA, } ss:
Western District of Michigan, }

On this 16th day of April, A. D. 1880, before me, the undersigned, personally appeared Daniel Chapman, by whom the foregoing petition was subscribed, who, being by me duly sworn, made solemn oath
82 that he had read the same, and knew the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and that as to those matters he believes it to be true.

HENRY M. HINSDILL,
Clerk Cir. Court.

[Endorsed]: U. S. circuit court for west. dist. of Michigan. In equity. Joseph W. Brewer, assignee, *vs.* Daniel Chapman *et al.* Petition for rehearing. Filed April 16, 1880. H. M. Hinsdill, clerk. C. B. Potter, solicitor for petitioner.

83 *Orders.—U. S. Court.*

THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 1st day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

Present: The Honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, Bankrupt,
Complainant,

vs.

DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM,
Defendants.

This cause came on to be heard upon petition by Daniel Chapman, one of the defendants herein, for rehearing, and the court, after hearing the arguments of counsel for the respective parties, took the same into consideration.

84 *Decision by S. L. Withey, Dist. Judge, June 8th, 1880.*

In the Circuit Court of the United States for the Western District of Michigan. In Equity.

JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, Bankrupt, Complainant,

vs.

DANIEL CHAPMAN *et al.*, Defendants.

Motion for Rehearing June 1, 1880.

Mr. Severens for the motion.
Mr. Ferris opposed.

There is but one question raised by the defendants as a reason why there should be a rehearing in this case, and it is whether the bankrupt law authorized this court to enjoin a sale of lands upon execution issued upon a judgment rendered in a State court in a
85 suit against the bankrupt commenced after proceedings in bankruptcy had been instituted, and in which suit judgment was rendered and levy made prior to the appointment of an assignee in bankruptcy. A petition in bankruptcy was filed in October, 1873, by creditors of Hoyt, upon which he was adjudicated bankrupt June 1, 1874. The assignee was chosen, and the usual transfer of the bankrupt took place in September following. The suit in the State court by defendant Chapman against Hoyt was commenced by writ of attachment January 12th, 1874, judgment rendered May 8th, 1874, execution issued upon the judgment, and a levy took place the day last named. All the proceedings in the State court are thus shown to have been prior to the appointment of the assignee in bankruptcy, including the levy. After the assignee had been appointed, the bill in this case was filed, and an order granted restraining the defendant Chapman and the officers having the execution from further
86 proceeding thereunder. In April last a decree was passed perpetually enjoining a sale under the judgment and execution referred to.

The laws of Congress declared that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating [to] proceedings in bankruptcy. R. S., sec. 720.

It is manifest, therefore, that unless this case is within the exception, the decree rendered was not authorized. One of the provisions of the bankrupt act gives to the several circuit courts concurrent jurisdiction with the district courts "of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest * * * * touching any property or rights of the bankrupt transferrable to, or vested, in such assignee." Sec. 4979.

87 It is true that an injunction is not authorized in express language by this provision of the bankrupt act, but it does au-

thorize the assignee in bankruptcy to bring suit in equity in this court, whenever any person claims an adverse interest touching property or rights of property of the bankrupt which has vested in the assignee or is transferrable to him.

If this suit was authorized, then the granting of an injunction was incident to the jurisdiction thus conferred. To determine whether the court had jurisdiction of this suit, it is only necessary to determine whether defendant Chapman, by his attachment, judgment, and levy upon the land of the bankrupt, was claiming an adverse interest touching such property. Upon this point there can be no doubt, nor that such property was transferrable to, or vested in, the assignee.

The assignee had no opportunity to appear in the State court in the cause there pending against the bankrupt until the plain-
88 tiff therein was upon the point of selling under the execution, for he had not received his appointment.

The following cases are referred to:

Diggs *vs.* Wolcott, 4 Cranch, 179.
Peck *vs.* Jenness, 7 Howard, 625.
Marshall *vs.* Knox, 16 Howard, 551.
Wharton *vs.* Smith, 18 Howard, 263.
Haines *vs.* Carpenter, 91 U. S., 254.
Eyster *vs.* Gaff, 91 U. S., 521.

The decree was rendered in this case at a hearing regularly noticed, but in the absence of defendant's counsel. It appearing that such absence was not intentional, this motion for a rehearing has been presented as though the cause was being heard upon the merits, hence we have considered the motion precisely as though the cause was being heard upon the pleadings and proofs.

Motion for a rehearing denied.

89 [Endorsed:] U. S. circ. court, western district of Michigan, southern division. Brewer, assignee in bankruptcy, *vs* Daniel Chapman *et al.* Decision of the merits upon a motion for rehearing. Right of circ. c't of U. S. to enjoin sale under execution issued on judg't in State court and levied upon the lands of the bankrupt. June 8, 1880. Filed June 8th, 1880. H. M. Hinsdill, clerk.

90 *Orders.—U. S. Court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, } *ss:*

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 8th day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

Present: The Honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, Bankrupt,
Complainant,
vs.
DANIEL CHAPMAN, JOSEPH W. WEIMER, and JAMES GRAHAM,
Defendants.

In this cause a motion for rehearing having been heretofore argued by counsel for the respective parties, and due deliberation thereupon having been had, on motion of Blair, Kingsley & Kleinhans, solicitors for the complainant—

Ordered, that said motion be, and the same is hereby, overruled and denied, with costs, including a solicitor's fee of ten dollars.

91 THE UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, Southern Division, }

The President of the United States of America to Daniel Chapman, Joseph W. Weimer, James Graham, and to their counsellors, attorneys, solicitors, agents, officers and servants, and each and every of them, Greeting:

Whereas, in the circuit court of the United States for the southern division of the western district of Michigan, in equity, before the judges thereof, Joseph W. Brewer, assignee of the estate and effects of Benjamin C. Hoyt, a bankrupt, hath lately exhibited his bill of complaint against you, the said Daniel Chapman, Joseph W. Weimer, and James Graham for relief (amongst other things) touching the right and title to certain lands and tenements situate in the county of Berrien and State of Michigan, and in the western district of Michigan aforesaid, viz: Lot one hundred and eleven (111),
92 the east sixty (60) feet of lot number one hundred and ninety-two (192), and twenty-two (22) feet west of the east twenty (20) feet of lot numbered two hundred and twenty-eight (228), all in the village of St. Joseph, in said county, according to the recorded plat thereof.

Also, the north thirty-seven and thirty-four one-hundredths ($37\frac{34}{100}$) acres of the northwest quarter of section two (2), in town four (4) south, of range eighteen (18) west, in said county.

Also, lot five (5), in block forty-three (43); also, block eleven (11), block twenty (20), and block thirty-three (33).

Also, lots two (2), three (3), and seven (7), in block fifty-one (51); lots five (5), six (6), and seven (7), in block fifty-two (52), all of which lots and blocks last named, and beginning with lot five (5), in block forty-three (43), being in B. C. Hoyt's first addition to the village of St. Joseph aforesaid.

Also, lots two (2), three (3), four (4), seven (7), and eight (8), in block fifty-eight (58); lots one (1), two (2), and four (4), in block fifty-nine (59); lots one (1), two (2), three (3), four (4), five (5), six
93 (6), seven (7), and eight (8), in block sixty-seven (67); lots one (1), two (2), three (3), and seven (7), in block sixty-eight (68);

all being in B. C. Hoyt's second addition to said village of St. Joseph, and the validity of the levies made thereon under and by virtue of the executions hereinafter mentioned, and for the matters in the said bill mentioned:

And whereas, by a decree made upon the hearing of the said cause, on Saturday, the 15th day of April, A. D. 1880, it was ordered and decreed by the said court, in equity sitting, among other things, that an injunction should issue, under the seal of the said court, to restrain you, the said Daniel Chapman, Joseph W. Weimer, and James Graham, and all the other persons before mentioned herein, perpetually from selling, disposing of, or interfering with said lands described as aforesaid, or any part thereof, upon the levies thereon, under and by virtue of any execution or executions issued out of the circuit
court for the county of Berrien aforesaid upon a judgment
94 recovered therein on the 8th day of May, A. D. 1874, by the
said Daniel Chapman against said Benjamin C. Hoyt for four thousand nine hundred and thirty dollars and fifteen cents ($4,930.15) and costs of suit, taxed at thirty dollars and ninety-four cents ($30.94), and from making any further levies on said lands, or any part thereof, under said judgment, and from further interfering in any way or proceeding further touching the matters in respect to which relief was prayed in the said bill mentioned:

We do therefore, in execution of the said decree, hereby firmly enjoin and command you and every of you that, from and immediately after being served with this our writ or notice thereof, you and each of you do entirely desist and refrain from selling, disposing of, or interfering with said lands, under and in virtue of said
levies, and from making any new or further levies on said
95 lands, or any part thereof, under said judgment; and this
you shall in no wise omit.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Grand Rapids, in the district aforesaid, this thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty.

[L. S.] HENRY M. HINSDILL, *Clerk.*
By JOHN McQUEWAN, *Deputy.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on this 3d day of Jan., 1881, I served the within injunction on Daniel Chapman and Joseph W. Weimer, two of the defendants within named, and Potter & Potter, their attorneys, by delivering to each of them personally at Berrien county, in said district, a true copy thereof, and exhibiting to them and each of them this original with the seal of the court thereon.

JOHN PARKER, *U. S. M.*
Fees, $10.10. By CUSHAN BURR, *Deputy.*

[Endorsed:] United States circuit court for the western district of Michigan. In equity. Joseph W. Brewer, assignee, *vs.* Daniel Chapman, *et al.* Injunction. Filed January 14, 1881. Henry M. Hinsdill, clerk. Blair, Kingsley & Klienhans, compl'ts solicitors.

96 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division. In Equity.

JOSEPH W. BREWER, Assignee in Bankruptcy of Benjamin Hoyt, Complainant,

vs.

DANIEL CHAPMAN, Defendant.

To the Judges of said Court:

The above-named defendant, by C. B. Potter, his solicitor, and H. F. Severens, his counsel, hereby claims an appeal from the final decree of this court made in the above-entitled cause to the Supreme Court of the United States, and prays the allowance of said appeal, presenting a bond on such appeal, which he also prays may be also duly allowed and approved.

Dated April eleventh, A. D. 1881.

C. B. POTTER, *Sol.*
H. F. SEVERENS,
Counsel for Defendant.

97 UNITED STATES OF AMERICA, } 88:
Western District of Michigan, }

The appeal within prayed for is hereby allowed.

Dated April 12th, A. D. 1881.

S. L. WITHEY,
Dist. Judge.

[Endorsed:] Claim and allowance of appeal. Filed April 12, 1881. H. M. Hinsdill, clerk.

98 UNITED STATES OF AMERICA, } 88:
Western District of Michigan, County of Berrien, }

Geo. E. Smith, Warren Chapman, & Junius H. Hatch, of said county, being each severally and duly sworn, do depose and say, each for himself: That they are each worth the sum of one thousand dollars over and above all liabilities and exemptions of law, and that they severally make this affidavit for the purpose of justifying their responsibility as sureties in a bond given on an appeal taken by Daniel Chapman, who is the principal in said bond, from a decree made by the circuit court of the United States for the western district of Michigan to the Supreme Court of the United States, in a cause wherein one Joseph W. Brewer was the complainant, as assignee of Benjamin Hoyt, a bankrupt, and the said Chapman was defendant.

GEO. E. SMITH.
WARREN CHAPMAN.
JUNIUS H. HATCH.

Subscribed and sworn to severally before me, this 31st day of March, A. D. 1881.

W. A. HAMILTON,
Notary Public, Berrien Co., Mich.

[Endorsed:] Justifying affidavits of sureties on bond. Filed April 12, 1881. H. M. Hinsdill, clerk.

99 Know all men by these presents that we, Daniel Chapman, of the township of St. Joseph, county of Berrien, and State of Michigan, as principal, and ——— ———, as sureties, are held and firmly bound unto Joseph W. Brewer, assignee in bankruptcy of Benjamin C. Hoyt, in the just and full sum of five hundred dollars to be paid to the said Joseph W. Brewer, assignee, as aforsaid; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 11th day of April, 1881.

Whereas, lately at a session of the circuit court of the United States for the western district of Michigan, in equity, in a suit depending in said court, between the said Daniel Chapman, as defendant, and the said Joseph W. Brewer, assignee in bankruptcy of said Benjamin Hoyt, as complainant, a decree was rendered against the said Daniel Chapman, and the said Daniel Chapman having duly taken an appeal to the Supreme Court of the United States—

100 Now, the condition of this obligation is such, that if the said Daniel Chapman shall prosecute his said appeal to effect, and also answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

DANIEL CHAPMAN. [SEAL.]
GEO. E. SMITH. [SEAL.]
WARREN CHAPMAN. [SEAL.]
JUNIUS H. HATCH. [SEAL.]

I hereby approve of the foregoing bond and the sureties thereto, April 12, 1881.

S. L. WITHEY,
Dist. Judge.

[Endorsed:] Bond. Filed April 12, 1881. H. M. Hinsdill, clerk.

101 THE UNITED STATES OF AMERICA:

To Joseph W. Brewer, as assignee of Benjamin C. Hoyt, a bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal which has been taken to the said Supreme Court from the final decree rendered by the circuit court of the United States for the western district of Michigan, in the southern division, by Daniel Chapman, who was defendant in the cause wherein said decree was rendered, and you were complainant, to show cause, if any there be, why the decree aforesaid should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, this 12th day of April, in the year of our Lord eighteen hundred and eighty-one.

S. L. WITHEY,
Dist. Judge.

102 UNITED STATES OF AMERICA, } ss:
Western District of Michigan, County of Berrien, }

Joseph J. Pearl, being duly sworn, says that on the 21st day of April, A. D. 1881, this deponent personally served the within citation on the within-named Joseph W. Brewer by exhibiting to him this original, and delivering to him a true copy thereof—superscribed "copy."

JOSEPH J. PEARL.

Subscribed and sworn to, this 21st day of April, A. D. 1881, before me.

GEO. S. CLAPP,
U. S. Commissioner.

[Endorsed:] Supreme Court of the United States. Joseph W. Brewer, assignee, &c., compl't, *vs.* Daniel Chapman, def't. Citation. Filed April 15, 1882. H. M. Hinsdill, clerk. Henry F. Severens, counsel for defendant.

103 THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

I, Henry M. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true and compared copy of the files and records and of the whole thereof in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court, at Grand Rapids, this 4th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] HENRY M. HINSDILL, *Clerk.*

Endorsed on cover: W. Michigan C. C. U. S. No. 206. Daniel Chapman, appellant, *vs.* Joseph W. Brewer, assignee of Benjamin C. Hoyt, a bankrupt. Filed 8th May, 1882.

114-158

SUPREME COURT

—OF THE—

United States.

OCTOBER TERM, 1885.

NO. 206.

PHILADELPHIA BAR ASSOCIATION

JOSEPH W. BREWER,
Assignee in Bankruptcy of
Benjamin C. Hoyt,
Complainant,

vs.

DANIEL CHAPMAN,
JOSEPH W. WEIMAR, and
JAMES GRAHAM,
Defendants.

BRIEF FOR DEFENDANTS.

H. F. SEVERENS, Counsel for Defendant.

KALAMAZOO:
H. H. EVERARD & CO., PRINTERS AND BINDERS.
1885.

UNITED STATES OF AMERICA.

SUPREME COURT.

OCTOBER TERM, 1885.

JOSEPH W. BREWER,
Assignee in Bankruptcy of
Benjamin C. Hoyt,
Complainant,

vs.

DANIEL CHAPMAN,
JOSEPH W. WEIMAR and
JAMES GRAHAM,
Defendants.

This case comes here on the appeal of the defendant, Daniel Chapman, from the Circuit Court for the Western District of Michigan.

The bill in this case was filed by the complainant for the purpose of restraining by injunction the proceedings on an execution issued to the defendant, Weimar, as Sheriff of Berrien county, by the Circuit Court of the

State for that county, on a judgment in that court in favor of Daniel Chapman, against the said Benjamin C. Hoyt.

The bill alleged that Benjamin C. Hoyt and Enoch C. Hoyt were bankers and dealers in real estate at St. Joseph, Mich., under the firm style of B. C. Hoyt & Son.

That on or about the 10th day of October, 1873, one Whittlesey, a creditor of the firm, filed a petition for an adjudication in bankruptcy against them in the District Court for that district; that the petition contained proper allegations as to residence, amount of indebtedness, and that the Hoyts had committed two acts of bankruptcy, one by fraudulently stopping the payment of their commercial paper, and the other that they had suspended and not resumed payment within fourteen days.

That an order to show cause was made thereon and a copy thereof served on the Hoyts, and that they appeared.

That on the 23d day of February, 1874, Enoch C. Hoyt died; that his death was suggested and the proceedings ordered continued against Benjamin C. Hoyt by order of May 2d, 1874. That Benjamin C. Hoyt was adjudicated a bankrupt on June 1st, 1874. That the complainant was elected assignee Sept. 4th, 1874, and that a deed of assignment of the effects of the bankrupt had been made to him by the Register.

That May 8th, 1874, Chapman recovered judgment in the Circuit Court for the County of Berrien against Benjamin C. Hoyt for $4,930.15 damages, and $30.50 costs. That an execution issued on that day to Weimer, as Sheriff, and was levied on certain described real estate in

Berrien county. That on Dec. 16th, 1874, while this execution was still in the hands of the Sheriff, an alias execution was issued and delivered to Graham, Deputy Sheriff, who on that day levied it on lands in Berrien county, which are described. That said executions are still in the hands of those officers, who threaten to proceed under them. That the lands were, except part, the separate property of the bankrupt, and that the levies constitute a cloud on his title and embarrass the complainant in disposing of the lands, and that notices of the levies have been filed with the Register of Deeds for Berrien county.

That the complainant was in actual possession of the land.

Answer on oath being waived, the complainant prayed for an injunction to restrain proceedings on the levies, and for subpœna, etc.

The defendants appeared and jointly and severally answered.

Their answer:

Admitted that the Hoyts were engaged in business as partners, as stated in the bill.

Admitted that Whittlesey's petition, the validity of which was denied, was filed at the date stated in the bill.

Denied that Benjamin C. Hoyt was ever adjudicated bankrupt on that petition.

Admitted that Enoch C. Hoyt died as stated in the bill.

Admitted that Benjamin C. Hoyt was adjudicated bankrupt, but not upon the aforesaid petition or any pe-

tition whereof he had notice. And admitted the election in form of the complainant as assignee, but denied that the adjudication was valid or that complainant could lawfully be elected assignee, and leave him to his proofs.

Admitted the recovery of the judgment by Chapman vs. Hoyt in the Circuit Court for Berrien county, as stated in the bill, and that execution was issued thereon and levied as stated; but they further show that the judgment was recovered in a cause which was duly commenced in said court on January 12th, 1874, by writ of attachment whereon the property in question was seized and levied upon, and that all things were done to make such levy effectual, and process was duly served on the defendant in that case.

Admitted that the alias execution was issued and levied as stated.

Admitted that both executions were in the hands of the officers.

Admitted that the property levied on was the separate property of Benjamin C. Hoyt, but denied that it was vested in complainant or that the levies clouded any title he had.

Disclaimed knowledge of complainant having possession, and left him to his proofs.

Denied the sufficiency of complainant's case, as stated, and claim the same benefit thereon as if they had demurred.

Complainants filed the usual formal replication.

From the proofs taken therein it appears that on the 10th of October, 1873, Whittlesey filed in the U. S. District Court a petition for an adjudication in bankruptcy against the two Hoyts.

Nothing whatever appears to have been done under this petition. No order was made thereon or notice given.

On the 5th day of March, 1874, Whittlesey filed another petition for an adjudication in bankruptcy against the same parties.

It contains no reference to the former petition, and is in all respects a new petition. It was endorsed (presumably by the attorney who filed it) "Amended Petition;" but it was not such in its substance and effect, or therein profess to be. And it was not filed by or under any order of the court authorizing or permitting it as an amendment.

On the 2d day of May, 1874, the death of Enoch C. Hoyt was suggested on the record, and the proceedings ordered continued against B. C. Hoyt. On the same day the latter filed his denial of bankruptcy.

On the 1st day of June, 1874, B. C. Hoyt, having withdrawn his denial, was adjudicated bankrupt. The caption of the order recites a petition of 19th October, 1873, which was not the date of the filing of either petition.

October 1st, 1874, the Register in Bankruptcy assigned to complainant, and it was shown by the oral evidence of the assignee that he had been acting as such since October 3d, 1874, and as such had had the care and

management of the property in question, and had paid taxes on it, and that it was worth $10,000.

On the other hand, it was proved that, on the 12th day of January, 1874, the defendant, Chapman, commenced suit by attachment against the two Hoyts in the Circuit Court for the County of Berrien. That his writ of attachment was duly levied on the lands in question, and the writ was personally served on the defendant, B. C. Hoyt.

On the 16th day of April, 1874, the death of Enoch C. Hoyt was suggested on the record of the Circuit Court for the County of Berrien, and the cause ordered to proceed against B. C. Hoyt.

And such further proceedings were had that on the 8th day of May, 1874, Chapman duly recovered judgment for $4,930.15 damages and costs of suit taxed at $30.94. And on that day execution was duly issued on the judgment and placed in the hands of Sheriff Weimar, the defendant, who on that day also duly levied the execution on the lands attached.

On the 16th of December, 1874, an alias execution was issued and delivered to the defendant, Graham, Deputy Sheriff, who also levied on lands attached.

And this was the situation of affairs when this bill was filed in the U. S. Circuit Court on the 27th day of January, 1876.

The court below decreed in accordance with the prayer in the bill and granted a perpetual injunction restraining all proceedings under the levies.

The questions presented are:

FIRST—Whether, upon the facts stated in the bill,

the alleged cloud was of such a nature as to constitute the ground for equitable jurisdiction in that behalf.

SECOND—Whether the United States Circuit Court had rightful authority to interfere with the proceedings of the State court, and

THIRD—Whether, if the assignee wished to contest these matters, he should not have made himself party to the proceedings in the State court, or have intervened there.

FOURTH—Whether the bill and the proof correspond, and incidentally whether this bill is adapted to contest the validity of the lien of the defendants derived under the attachment.

And the decree below is alleged to be erroneous in respect to each of the three questions last above stated, the court having decreed, in effect, in the affirmative of the first, second and fourth propositions, and in the negative of the third.

I.

The allegations of the bill do not show very distinctly whether the complainant claims anything upon the supposed ground of invalidity of the proceedings in State court. Some parts of its frame would indicate that he did. In any event, it is well settled that an action to remove a cloud cannot be sustained when it is apparent that upon the facts set up in the pleading, if true, would not legally affect the title of the complainant. Nor will

a bill be sustained when the matters relied upon as the basis for removing the cloud are of record and not *in pais.*

Farnham vs. Campbell, 34 N. Y., 480.
Marsh vs. City of Brooklyn, 59 N. Y., 280.
Ward vs. Dewey, 16 N. Y., 515, per Selden J.

II.

Touching the second question presented, viz: "Whether the United States Circuit Court had rightful authority to interfere with the proceedings of the State court," we submit that the general doctrine is well settled that the Federal Courts have no authority, in cases not within their appellate jurisdiction, to issue injunctions to judgments in State courts, or in any manner to interfere with their jurisdiction or proceedings.

Judge Story, in his work on the Constitution, speaking of the jurisdiction of the Federal and State judiciary, says:

"In the exercise of the jurisdiction confided respectively to the State courts and those courts of the United States, where the latter have not appellate jurisdiction, it is plain that neither can have any right to interfere with or control the operations of the other. It has accordingly been settled that no State court can issue an injunction upon any judgment in a court of the United States, the latter having an exclusive authority over its own judgments and proceedings. Nor can any State court or State Legislature annul the judgments of the courts of the United States, or destroy the rights acquired under them; nor in any manner deprive the Su-

preme Court of its appellate jurisdiction; nor in any manner interfere with or control the process (whether mesne or final) of the courts of the United States; nor prescribe the rules or forms of proceeding; nor affect a process in the courts of the United States; nor issue a mandamus to an officer of the United States to compel him to perform duties devolved on him by the laws of the United States. * * *

"On the other hand, the National courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in State courts; or in any other manner to interfere with their jurisdiction or proceedings."

Story on the Constitution, § 375, 376.

This doctrine has been steadily maintained by an unbroken line of adjudication.

Driggs vs. Wolcott. 4 Crauch, 179
Hagan vs. Lucas, 10 Pet., 400.
Peck et. al. vs. Genniss et. al., 7 How., 624.
Williams vs. Benedict, 8 How., 107.
Peale vs. Phipps, 14 id, 368.
Pulliam vs. Osborne, 17 id, 471.
Taylor et. al. vs. Carryl. 20 id, 583.
Freeman vs. Howe et. al., 24 id, 450.
Buck vs. Colbath, 3 Wall., 334
Johnson vs. Bishop, 8 N. B. Reg., 533.

It remains to be considered in connection with the second inquiry whether there is anything in the act of Congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," which confers upon the Federal courts authority to arrest the proceedings of a State court or restrain its officers in the execution of its lawful mandates.

(The order of the District court granting the writ of injunction appears in the record, pages 32 and 33.)

The Circuit Court, it seems, sustained the issuing of the writ of injunction, under that section of the bankrupt act which provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts "of all suits at law and in equity brought by an assignee in bankruptcy against any person claining an adverse interest. * * * touching any property or rights of the bankrupt transferable to or vested in such assignee."

Record, pages 38 and 39.

Upon this point it is submitted that the Court erred and that the order of the United States Circuit Court, in this case, perpetually enjoining the Sheriff of Berrien county from enforcing the execution issued by the State Court of that county, finds no warrant in the act referred to and is opposed to the current of recognized authority.

In support of this view, attention is directed to the following cases, some of which have been already cited upon another point:

Peck vs. Genness, 7 How., 612.
Marshall vs. Knox, 16 Wall., 551.
Doe vs. Childress, 21 Wall., 642.
Eyster vs. Gaff et. al., 91 U. S., 521.
Burbank vs. Bigelow et. al., 92 id, 179.
Norton vs. Switzer, 93 id, 355.
Jerome vs. McCarter, 94 id, 734.
Davis vs. Friedlander, 104 id, 570.
Thatcher vs. Rockwell, 105 id, 467.
Johnson vs. Bishop, 8 N. B. R., 533.

III.

Upon the third question raised, "Whether, if the assignee wishes to contest these matters, he should not have made himself party to the proceedings in the State court," the authorities already cited under the second inquiry clearly indicate such to be the proper practice.

Indeed, that provision of the bankrupt act which authorizes the assignee in bankruptcy to "prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt," would seem to leave no doubt as to the proper steps to be taken by the assignee.

Bankrupt Act, § 14.

Upon this point special attention is called to the cases of

Peck vs. Genness, 7 How., 612.
Doe vs. Childress, 21 Wall., 642.
Eyster vs. Gaff, 91 U. S., 521.
Johnson vs. Bishop, N. B. R., 533.
Hill vs. Harding, 107 U. S , 631.

IV.

The bill is not framed to present or contest the substantial question as to the defendant's lien. It ignores altogether the attachment, and is not therefore adapted to make a contest on its validity under the bankrupt law. The allegations and the proof are not harmonious.

It is also submitted that in substance and legal effect the adjudication in bankruptcy must be construed to have reference to the last petition and not to the former, under which nothing was done.

The caption of the order was no part of it.

Jackson vs. Ashton, 8 Peters, 148

This would make a variance from the bill and would make the initiation of the bankruptcy proceedings subsequent to the attachment of the plaintiff, and present a question not competent to be litigated on such pleading as the complainant's bill.

Moran vs. Palmer, 13 Mich., 337.
Piatt vs. Vattier, 9 Pet. 405.
Boone vs. Chiles, 16 Pet., 177.
Story's Equity pleadings, § 23.

For these reasons, it is respectfully submitted that the court below erred in its decree, and that such decree should be reversed and the bill dismissed.

H. F. SEVERENS,
Counsel for Defendant.

114-158

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1884.

NO. 206.

PHILADELPHIA BAR ASSOCIATION

JOSEPH W. BREWER,
Assignee of Benjamin C. Hoyt,
Complainant,

vs.

DANIEL CHAPMAN,
JOSEPH W. WEIMAR and
JAMES GRAHAM,
Defendants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS.

H. F. SEVERENS, Counsel for Defendants.

KALAMAZOO, MICH.:
DAILY GAZETTE BOOK AND JOB DEPARTMENT.
1885.

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Defendants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS.

An examination of the brief prepared by counsel for complainant, and of the two cases of Krippendorf vs. Hyde, 110 U. S., 276, and Covell vs. Heyman, 111 U. S., 176, which had not been seen when the original Brief for de-

fendants was prepared, lead to the presentation of this supplemental brief.

I.

Attention is again called to the proceedings in the Bankruptcy Court.

It appears that a petition for an adjudication against the alleged bankrupts, a firm, was filed Oct. 10, 1873. It does *not* appear that the petitioner filed any proof of the bankruptcy, or any proof of his claim, or that the Court took any cognizance thereof whatever.

The statute (Rev. Stat. U. S., §5024) requires that on the filing of the petition the Court shall make an order directing notice to the parties proceeded against, and the same section prescribes the service of the notice

But the Court has no jurisdiction to do this unless the petition is supported by the requisite proof of the claim and bankruptcy.

This is the necessary sequence of the above cited section, construed with the orders and forms prescribed under the Act by the Supreme Court.

In Re Rogers, 10 Bankr. Reg. 444.
In Re Leonard, 4 Bankr. Reg. 562.
In Re Price & Miller, 8 Bankr. Reg. 514.
In Re Bromley & Co., 3 Bankr. Reg. 686.
Ala. & Chat. R. R. Co. vs. Jones, 7 Bankr. Reg 145.

Nothing of the kind was done here, and the proceeding became abortive.

Nearly five months thereafter, and on the 5th day of

March, 1874, another petition, without any leave of the Court, was filed, in no way referring to the former petition, or professing to be in continuance of any former proceeding. And again no proofs are filed and no action is taken by the Court, or notice taken of the filing of this petition. About two months later still, May 2d, 1874, the death of one of the bankrupts is suggested on the Record, and the matter ordered to proceed against the survivor. And on the same day a denial of bankruptcy of this survivor is filed by his attorneys.

The next step was taken June 1st, 1874, when, on consent of the survivor, an adjudication was had against him as an individual. (See the order at the bottom of page 29 of the Record.)

The petition (and this is true of both petitions) alleged the bankruptcy of a firm, and the proceedings proposed thereby to be inaugurated were against the copartnership.

The proceedings throughout were strangely anomalous, and the adjudication was inconsequential.

The copartnership was never adjudged bankrupt.

The petition was aimed at such an adjudication and not at the adjudication of an individual as bankrupt. And the proceedings were quite different under the bankrupt law.

Wherefore I submit that both by want of continuity of the proceedings, and because the petition presented was not pursued in the adjudication such proceedings were inoperative to defeat the rights acquired by Chapman in his attachment suit.

But again, I submit that the mere filing of a petition without pursuing it by invoking and procuring the action

of the Court thereon, was a nullity, and it would seem to be right to say that in order to make the filing of a petition a valid beginning of the proceedings, the filing must be *presently* followed up the filing of proof, and by an order of court for service of notice; and it is difficult to see how the Bankruptcy Court ever got jurisdiction to make the adjudication it did at all, unless it was by the consent of Benjamin C. Hoyt on the date of the adjudication, to-wit: on the 1st day of June, A. D. 1874. Whether the Bankruptcy Act confers jurisdiction to enter an adjudication by consent in this method is, I submit, more than doubtful.

If these positions be sound, the complainant Brewer has no character in which to maintain this suit. Or if the Bankruptcy Court got jurisdiction to make the adjudication by the consent of Benjamin C. Hoyt on the 1st day of June, 1874, then it follows that the bill is without foundation upon the merits.

The lodging a petition with the clerk and not prosecuting it, would, as to the creditors of the debtor at most, imply that nothing was intended, and leave them at liberty to pursue their common law remedies.

II.

The late case of Covell vs. Heyman, 111 U. S., 176, is in strong corroboration of the second point argued in the original brief, and seems complete authority on which to affirm that "property thus levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the Court whose process it is, and as long as long as it remains in the possession of the officer it is in the custody of the law." "And the exclusive authority of the

Court issuing the writ extends, not only to the decision of all questions affecting its jurisdiction, and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but, also, of all questions affecting the identity of the person or property seized and held under color of its authority, and the right to exempt them from its operation," and that if the State Court should err in failing to give due effect to any valid paramount right asserted under the authority of the United States, the proper remedy is by revisory proceedings and not by hostile suit.

Touching the subject of possession of the property alleged by the complainant, and which, in conformity with the requirements of the State practice, as well as the general principles of equity in such cases as an essential basis of relief, he alleges in himself, it is to be observed that the possession of the State Court, by its officer, was all that it was possible to take.

Possession acquired by the assignee by unlawful invasion upon the jurisdiction and possession of the State Court can give him no vantage ground.

The property came into the control of the State Court by virtue of the levy of the attachment, and by well settled rule the execution was a continuance of the lien originally acquired under the attachment.

III.

So also the case of Krippendorf vs. Hyde, 110 U. S., 276, confirms the position taken in the third point in the original brief, and supplements the doctrine of Covell vs. Heyman, 111 U. S., 176, by designating the appropriate

line of procedure for one who asserts rights which he claims to be paramount to those of the Court having control of the property, and emphasizes the propriety of the procedure in such cases by intervention, or ancillary, or subsidiary proceedings in the Court which has the control of the property.

H. F. SEVERENS,

Counsel for Defendants.

114-158

Supreme Court of the United States.

OCTOBER TERM, 1884.

NO. 206.

DANIEL CHAPMAN,
Appellant,
vs
JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, a Bankrupt,
Appellee.

PHILADELPHIA BAR ASSOCIATION

APPEAL FROM THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLEE.

JOHN W. STONE,
Of Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1884.

NO. 206.

DANIEL CHAPMAN,
Appellant,
vs.
JOSEPH W. BREWER, Assignee of Benjamin C. Hoyt, a Bankrupt,
Appellee.

STATEMENT OF FACTS.

On October 10, 1873, a creditor's petition in Bankruptcy was filed in the District Court for the Western District of Michigan, against Benjamin C. Hoyt and Enoch C. Hoyt, who then and for several years prior had carried on business in said District as bankers and real estate dealers under the firm name of B C. Hoyt & Son.

After the Bankruptcy proceedings had been commenced, and in January, 1874, Daniel Chapman, the appellant, commenced suit by attachment in the State court against the bankrupts, and levied on a portion of the lands in controversy, viz: the lands described in the 5th paragraph of the bill of complaint, but did not levy on the other lands described in the 6th paragraph

(See Record, pages 2 and 3, for lands described in bill of complaint, and pages 12 and 13 for lands attached.)

On March 5. 1874, an amended petition was filed.

Record, pp. 26, 28.

During the pendency of the bankruptcy proceedings, and before an adjudication, Enoch C. Hoyt died and his death was suggested, and on May 2, 1874, an order was made continuing the proceedings against the survivor, B. C. Hoyt. And on the same day the survivor appeared by attorneys, denied that he had committed any acts of bankruptcy, and demanded a jury trial.

Record, p. 29.

On May 8, 1874, Chapman recovered judgment in the attachment suit against the bankrupt, B. C. Hoyt, and on the same day an execution was issued and levied by Joseph W. Weimer, the Sheriff of the county, who was one of the defendants in the court below, on the lands which had been attached, namely, the lands described in paragraph 5 of the bill.

Record, page 19.

On June 1, 1874, an adjudication in Bankruptcy was made, the debtor having appeared by counsel and withdrawn his denial of bankruptcy.

Record, pages 29, 30.

The complainant was elected assignee, and on October 1, 1874, received from the Register in Bankruptcy the usual deed of assignment of the bankrupt's effects.

Record, pages 20, 21.

On the 16th day of December, 1874, another execution was issued in the suit of Chapman vs. Hoyt, which was delivered to James Graham, a Deputy Sheriff, by whom it was on the same day levied on lands of the bankrupt which had not been attached, namely, the lands described in the 6th paragraph of the bill.

Record, p. 20.

The assignee filed his bill making Chapman, Weimer the Sheriff, and Graham, the under Sheriff, defendants, stating that he was in actual possession of the lands, and praying that the levies might be decreed to be void, and that the defendants release to him and be restrained from selling; and upon the hearing the court made a decree accordingly.

Record, pp. 32, 33.

The defendants, although the cause was properly noticed for hearing through inadvertance failed to appear at the hearing.

Record, pp. 31, 34, 35 and 36.

The defendants moved for a re-hearing, upon the sole ground that the Bankrupt law did not authorize the Circuit Court to enjoin a sale of lands upon an execution from a State court, and the re-hearing was denied.

Record, pp. 38, 39.

This motion was presented and considered as though the cause was being heard on the merits on pleadings and proofs.

Record, p. 39.

The defendant Chapman appealed. The other defendants did not.

From the foregoing statement it will be seen that the suit in the State court was commenced, and all the levies of the attachment and executions made *after* the commencement of the bankruptcy proceedings.

The bankruptcy suit was commenced October 10, 1873, and the suit of Chapman vs. Hoyt in January, 1874.

POINTS FOR APPELLEE.

I.

Hoyt was adjudged a bankrupt on the petition filed October 10, 1873.

This is denied in the answer, and is one of the issues in the case.

The adjudication itself shows upon what petition it was made.

Record, p. 29.

By a typographical error the date of filing the petition is given in the printed record as October *19th* instead of *10th;* but that the latter is the true date is apparent from the clerk's certificate on page 30; also from the stipulation of counsel on page 24, and will so appear from an inspection of the original transcript. It is also claimed that Hoyt had no notice of this petition, but the record (page 29) shows that he appeared by attorneys, and they were present in court when the adjudication was made and consented thereto.

They, as well as the court and counsel for the petitioning creditor, must have understood that the adjudication was being made on the original petition of October 10th.

And it is submitted that the record of the court cannot be attacked collaterally.

II.

The assignee was in possession and had the legal title to the lands in question and the levies of the defendant were clouds on his title which he might properly call on a court of equity to remove.

The statute of Michigan provides as follows:

"Any person having the actual possession and legal or equitable title "to lands may institute a suit in chancery against any other person "setting up a claim thereto in opposition to the title claimed by the com- "plainant, and if the complainant shall establish his title to such lands, "the defendant shall be decreed to release to the complainant all claim "thereto and pay costs, unless the defendant shall by his answer disclaim "all title to such lands and give a release to the complainant in which "case costs shall be awarded as the court may deem just."

Howell's Stat., vol. 2, § 6626.

1. The assignee by the deed of assignment acquired the title of the bankrupt, and this title by operation of law related back to the commencement of the bankruptcy proceedings.

U. S. Rev. St., § 5044.

The deed of the Register in Bankruptcy conveys in terms to the assignee "all the estate, real and personal, of the said Benjamin C. Hoyt, "bankrupt aforesaid, including all the property of whatever kind of "which he was possessed, or in which he was interested or entitled to "have, on the 10th day of October 1873."

This deed is also made by the statue *conclusive* evidence of the title of the assignee to take, hold, sue for and recover the property of the bankrupt.

U. S. Rev. Stat., § 5049.

So much so that it is not necessary to prove all the steps in the bankruptcy proceedings nor the jurisdiction of the court, nor the validity of the adjudication.

Shawhan vs. Wherritt, 7 How., 627.

Cone vs. Purcell, 56 N. Y., 649.

Dambmann vs. White, 48 Cal., 439.

Barstow vs. Adams, 2 Day (Ct.), 70, 96.

2. The assignee was in possession of the lands in controversy. His testimony (Record, p. 22) is uncontradicted on this subject. But posession is not essential when the object of the bill, as in the present case, is to relieve the title to the land from an incumbrance. Equity will afford a remedy independent of the statute.

Methodist Church of Newark vs. Clark, 41 Mich., 730, 739.

Jones vs. Smith, 22 Mich., 365.

3, The defendants were, by their levies, setting up a claim to the land in opposition to the title of the complainant, and this claim having arisen after the complainant's title, was void as to him, and constituted a cloud on his title, which made it unmarketable and prevented sales.

It is claimed by the appellant that an action to remove a cloud cannot be sustained when it is apparent that the facts set up in the pleadings, if true, would not legally affect the title of the complainant.

If the Sheriff had been allowed to proceed to sale, these levies would

have resulted in a deed, which would have been *prima facie* evidence of regularity.

The statute of Michigan giving the deed this effect is as follows:

"When a deed or other conveyance made by an executor, administrator, guardian, commissioner, sheriff, marshal, or person acting under authority of an order of court is left for record, the register of deeds shall enter in the indexes of the officer or person, the names of the testators, wards or persons who owned the estate, and from whom it passes when the same appear by such deed, and also the name of such executor, administrator, guardian, commissioner, sheriff, marshal or other person executing the same; and when a decree or order for the partition of land or the commissioner's return thereof is so left for record, the register shall enter in the indexes the names of all the persons whose estates plainly appear to be affected thereby. And all such deeds, the record or a certified copy of such record, shall be in all courts and places *prima facie evidence of the regularity of all the proceedings required by law anterior to such deeds, and of the authority of the grantor therein named to execute such deed or deeds.*"

Howell's Statutes, Vol. 2, § 5678.

The rule is that when the liens may result in a sale and deed which is *prima facie* regular, they constitute such a cloud that equity will afford relief, notwithstanding the liens may be void of themselves.

Palmer vs Rich., 12 Mich., 414, 419, 420.

Schofield vs. City of Lansing, 17 Mich., 437, 447, 448.

Again, the authorities cited by the counsel for the appellant hold that where any extrinsic question is involved, that such action is maintainable. In this case, we have the question of whether Hoyt was adjudicated a bankrupt upon the petition of October 10, 1873; whether he was ever adjudicated at all and whether the court ever obtained jurisdiction over him.

Whether a court of equity will relieve against a cloud void on its face, is not a question of jurisdiction, but of discretion and expediency.

Hamilton vs. Cummings, 1 Johns Ch., 517.

It is not expedient or equitable to apply this rule in favor of a defendant, who neither demurred or disclaimed at the outset of the suit nor made the objection at the hearing in the court below, and now makes it for the first time in the appellate court more than nine years after the commencement of the litigation.

4. The complainant has thus shown every statuory requisite to entitle him to so much of the decree below as declared the levies were clouds on his title and directing the defendants to release them, viz;

(*a.*) Possession.
(*b.*) A legal title in himself.
(*c.*) A claim set up by the defendants.
(*d.*) Complainant's title substantiated.

III.

The attachment levies were merged in the execution levies, so far as the same lands were levied on both writs, and to restrain sales on the executions will give the complainaut full relief against both class of levies.

IV.

The Circuit Court had jurisdiction in a case like this to enjoin proceedings in the State Court, and this power to protect the assets of the bankrupt estate was the more necessary in this case, because the assignee had no opportunity to intervene in the State Court, not having been appointed until after the judgment had been rendered and in process of execution.

The decree below restrained the defendants from selling on these levies, or making any new levies on the lands under the judgment, and this was the sole point litigated below.

It is true the Circuit Courts are in general without jurisdiction to grant an injunction to stay proceedings in a State Court, but an excep-

tion is made where the injunction is authorized by any law relating to proceedings in bankruptcy.

U. S. Rev. Stat., § 720.

The bankrupt law conferred on the Circuit Courts jurisdiction concurrent with the District Court of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in the assignee.

U. S. Rev. Stat., § 4979.

An injunction is not authorized in express terms by this section, but it does authorize the assignee to bring the suit, and if the suit was authorized, then the court as an incident to its jurisdiction could grant the injunction.

The means by which the court shall settle the conflicting claims of the assignee and adverse claimants are not enumerated, but power to adjust these equities is given and the right to employ the proper legal process to that end follows by necessary implication.

The aim and policy of the statute cannot be effectually carried out in any other way. And numerous decisions of the courts affirm this power.

In re William Christy, 3 How., 292.

In re Mallory, 1 Sawyer, 88.

In re Kerosine Oil Co., 6 Blatch., 521.

Markson vs. Heaney, 1 Dill., 497.

Pennington vs. Lowenstein, 1 Bank Reg., 570.

Pennington vs. Sale, 1 Bank, Reg., 572.

Jones vs. Leach , 1 Bank Reg., 595.

Hyde vs. Bancroft, 6 Benedict, 392.

Samson vs. Clark, 9 Benedict, 372.

The Bankruptcy court having first acquired jurisdiction over the bank-

rupt's assets, they could not be levied on by process from the State Court.

Hagan vs. Lucas, 10 Peters, 400.

Peck vs. Jenness, 7 How., 612.

Turner vs. Carryl, 20 How., 583.

Freeman vs. Howe, 24 How., 450.

Covell vs. Heyman, 111 U. S., 176.

For these reason we submit that the decree below should be affirmed

Respectfully submitted,

JOHN W. STONE,

Counsel for Appellee.

114 174

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 10. Original.

Ex Parte: In the Matter of DAYTON S. MORGAN and C. ASHLEY SMITH, Petitioners.

Return to Alternative Writ of Mandamus.—Filed March 23, 1885.

Return to said Petition by the Circuit Judge of the Seventh Judicial Circuit.

To the Honorable the Judges of the Supreme Court of the United States of America:

William A. Woods, judge of the district court for the district of Indiana, and upon whom notice of the pendency of this proceeding was served by the petitioners, and who sat as circuit judge at the time some part of the proceedings were had in the cause set forth in the petition of the said petitioners, for return to the alternative writ of mandamus issued by said court against him on application made by Dayton S. Morgan and C. Ashley Smith, claiming the right to have an order and decree made and entered in the cause in the petition set forth, says:

That upon the hearing and trial of the said cause of Morgan and Smith *vs.* Frederick Eggers, in the circuit court of the United States for the district of Indiana, was had and

heard before the Honorable Walter Q. Gresham, then judge of the district court for the district of Indiana, who, as your respondent is informed and believes, sat as circuit judge in the hearing and trial of said cause.

And your respondent respectfully shows that he has no knowledge or information respecting the hearing and trial of said cause other than that contained in the records and papers now on file in said court in relation thereto, and the statement made and prepared in this proceeding by the said Honorable Walter Q. Gresham, which he now refers to and asks that it may be taken and deemed a part of this his return, with like effect as if made by him. And he further respectfully shows that the matters and things set out and alleged in the statement made by the said the Honorable Walter Q. Gresham he believes in every respect to be true.

And your respondent further respectfully shows that after he became the district judge for the district of Indiana, that on the 23rd day of April, 1884, the said Morgan and Smith filed in the said circuit court of the United States for the district of Indiana their motion in writing, asking for the reformation and correction of the judgment of the court theretofore rendered in this behalf, a copy of which motion is set out on pages 18 and 19 of the printed petition of the said Morgan and Smith.

That upon proper notice to the defendant in that proceeding the parties appeared, and, on argument had before your respondent, sitting as judge of the circuit court, he overruled said motion for the reasons set out in the opinion, which is set out on pages 19 and 20 of the printed motion of the said Morgan and Smith filed herein, and which your respondent now refers to and asks that it may be taken as a part of this return with like effect as if set out in full in this return.

And your respondent further respectfully shows that the entry of which complaint is made of the finding and judgment of the said circuit court is not "covertly and secretly a judgment for the defendant as to all the lands sued for,

which are worth more than five thousand dollars, based on a verdict for the plaintiffs, upon all the averments of the declaration, as to their title to and right to possession of said lands therein sued for," but is a judgment for that part of the land sued for in the complaint which lies south of an established boundary line, and said judgment is within the purview of the laws of the State of Indiana in such cases made and provided.

And your respondent further shows that by the law of Indiana it is competent and proper and lawful for the courts of that State to render a judgment in favor of one or more plaintiffs against one or more defendants for such part of the real estate in controversy in any suit as it may be shown on the trial of the cause such plaintiff is entitled to have and recover, and that in so far as a judgment of that kind establishes a boundary line it is competent, proper, and lawful for such judgment to be entered.

And your respondent respectfully shows that, being of that opinion, he construed the entry of the judgment theretofore entered on the trial of said motion before referred to in said cause as being of the following tenor and effect, and as if it had been written "and the court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to, and shall have and recover of the defendants," etc., etc., and thereupon overruled the motion of the said Morgan and Smith for a correction or modification of the original entry aforesaid.

Wherefore this respondent prays the judgment of the court whether he may be further ordered or commanded to alter or change the entry made on the trial of the cause in the said court in the first instance, and that the petition herein and the alternative writ may be hence dismissed.

March 19, 1885.

WILLIAM A. WOODS.

Comes now Walter Q. Gresham, judge of the seventh circuit of the United States, and for answer to the alternative

writ of mandate herein respectfully shows unto the court that he is now judge of the circuit court for said circuit in which is the district of Indiana.

That heretofore, to wit, on the 20th day of January, 1883, he was the district judge in and for said district of Indiana, and that he sat as judge of the circuit court upon the trial of the said cause of Morgan and Smith *vs.* Frederick Eggers, being the cause in the writ mentioned, and that the issues were formed as in the petition and writ appears.

Upon said cause coming on for trial a jury was waived by agreement of parties made in open court, and the cause thereupon submitted to the court for trial.

He shows to the court that by the seventeenth (17th) rule of the circuit court of the United States for the district of Indiana then in force it was provided:

(17.) "Articles 29 and 30 of ch. 1, part 2, of volume 2, Revised Code of Indiana, adopted in 1852, relating to the recovery of real property and determining conflicting claims thereto, and the amendments thereto, Acts 1855, p. 57, and the article relating to occupying claimants, are adopted as the law of this court."

That said act of 1855 in said rule referred to is as follows:

"The answer of the defendant shall contain a denial of each material statement or allegation in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable."

Said law of 1855 is now section 1055 of the R. S. of 1881, and has been in force at all times since the 17th of August, 1855.

He further states that by section 600 of the Code of 1852, within said article 29, it was provided as follows, *as* shown in the petition under section 1060 of the R. S., 1881:

"The plaintiff may recover (against one or more of the defendants) the premises, or any part thereof." * * *

That upon the trial of said cause it appeared that two or more surveys had been made by different officers of that portion of lands lying between Lake Michigan and the Illinois State line in Lake county, Indiana, and that the lines of said surveys as to said lots one and two were dissimilar.

It further appeared upon the trial of the said cause without controversy that the defendant Eggers, about the year 1852, settled upon lot one, it being in the extreme northwest corner of the State of Indiana.

At that time this section was wild and wholly unimproved, and it further appeared that shortly afterwards, to wit, on the 19th day of July, 1853, the said Eggers entered said lot one under the Swamp Land acts of the State of Indiana, said lands in that part of Lake county having theretofore been granted to the State of Indiana by acts of Congress.

It also appeared at that time, without contradiction, that said Eggers found one stake on the Illinois State line, and another near the lake shore, which, he believed, before and at the time of the purchase, and always afterwards, marked the southern boundary of said lot one, and soon after making said entry and obtaining a patent from the State of Indiana he took possession of all that portion of said premises lying north of the line indicated by the stakes aforesaid, claiming title under his said purchase, and proceeded to construct a fence from said State line towards and *to* the lake, between the stakes aforesaid, which fence he had continuously maintained at all times, and for more than twenty years next preceding the commencement of said action.

It further appeared that he had, shortly after obtaining title, cleared parts of said lands and cultivated the same up to the said fence, and at all times occupied, claimed, and asserted ownership of all that portion of the premises lying

north of said fence. And, as evidence of his claim, it appeared that, shortly after obtaining title, and more than twenty years before the commencement of said action, he had established a family burial ground near to the said fence and within the boundaries of that portion of the premises claimed by the plaintiffs, and at all times maintained said burial place in a suitable manner.

It further appeared upon the trial of said cause by the testimony of the defendant, and of his son, that a few years after he had obtained his patent to said lot one some surveyors were surveying lands in the State of Illinois immediately west of said premises, and the then proprietor of lot two, to wit, George W. Clarke, or Jacob Forsyth, was present, and upon request the said surveyors marked the south line of lot one and ran it immediately south of the said fence theretofore made by said Eggers, and that Clarke, or Forsyth, made no objection to that being the true line.

It further appeared upon the trial of said cause by the testimony of the defendant and his son, and by a photograph introduced, that the said Clarke, in his lifetime, was often at the house of said Eggers upon said lot one, and that during his lifetime it was always understood between him and the defendant Eggers that the said fence was the true southern boundary of said lot one, and that the said Clarke, at no time during his lifetime, asserted or claimed that the said fence was not the true boundary line between said lots one and two. And the respondent respectfully shows unto the court that the map exhibited in the petition is not the map of the survey under which the defendant Eggers claimed title, but is another survey which shows the claim made by the plaintiff.

Respondent further states to the court that by the law of Indiana, being section ——— of the R. S. of 1881, it is enacted, "That actions * * * for the recovery of the possession of real estate shall be brought within twenty years."

And the supreme court of said State held in the case of

Bowen *vs.* Preston (48 Ind., 367), decided in the year 1874, "That when the title is in controversy it is to be shown by legal proof a continual disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it." * * *

It further appeared upon the trial that the defendant Eggers never claimed dominion or ownership over any portion of the premises south of said fence. It therefore followed that, as it appeared upon the trial that the defendant Eggers had been in open, notorious, exclusive, and adverse possession for more than twenty years next preceding the date of the commencement of said action of all that portion of the premises lying north of said fence, and as it appeared that said fence was built across lot two, as shown by the map and survey upon which plaintiffs predicate their description, your respondent decided that the defendant Eggers was the owner of all that portion of said lands lying north of said fence, and the plaintiffs of all that portion lying south of said fence.

And thereupon your respondent, sitting as the circuit judge, announced his decision to be that the defendant was the owner of so much of said lot two (2) as laid between the south line of said lot one (1) and said fence, and the plaintiffs were the owners of and entitled to recover only so much of said lot two (2) as was south of said line of said fence, and directed an entry to be drafted accordingly.

Whereupon the defendant's counsel drafted an entry, and submitted the same to the plaintiffs' counsel and to the court, and it was examined by them; and no objection being made to the form of the entry it was approved by the court

as expressive of the said decision announced, and ordered spread of record, and was in the words and figures following, to wit:

MORGAN *et al. vs.* EGGERS.

"Come the parties by counsel, and by agreement this cause is submitted to the court for trial; and the court, having heard the evidence and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two as lies south of the south line of lot one, as indicated by a fence constructed and maintained by the defendant, as and on said south line, said fence running from the State line easterly to Lake Michigan, and assess the damages at $1, and costs taxed at $—, which the plaintiff shall recover of defendant. All of which is finally ordered, adjudged, and decreed."

Afterwards, to wit, on the 5th day of February, 1883, the defendants filed their written motion and reasons for a new trial, on the ground that the finding and decision was contrary to law, contrary to the evidence, not sustained by the evidence, and that the plaintiffs were surprised by the testimony of the defendant and his son upon the trial in regard to the building and maintenance of said fence and the possession and occupancy and claim of right of all that part of the premises lying north thereof; and for no other reasons.

And at the same time plaintiff filed the affidavit of Edward Roby in support of said motion, which related only to such matters of surprise.

Afterwards, on the 6th of March, 1883, the defendant filed affidavits in answer to the affidavit of said Roby.

And thereupon the matter was orally argued, and no objection was made or pointed out to the form of the entry made at the trial; and upon full consideration the said motion was denied, and the plaintiffs were given thirty days in which to file bills of exceptions.

No further steps were taken in said cause until April 23d, 1884, when, as appears from the files in said cause, the plaintiffs filed their motion before his Honor Judge Woods, "to amend and reform the judgment entered in the above-entitled cause at the November term of this court, A. D. 1882, on the 20th day of January, A. D. 1883, so that said judgment shall conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause."

The defendant appeared thereto, and such proceedings were had before his Honor Judge Woods, sitting as judge of the circuit court of the United States at Indianapolis, that said motion was overruled for the reasons assigned in the opinion entered by him, and which is set out in the petition in this matter.

And thereupon afterwards, to wit, on the ninth day of January, 1885, said petitioners procured a writ of error to be issued out of this Court, directed to said circuit court, and caused a citation to be issued out of said circuit court, addressed to said Frederick Eggers, to be and appear thereto in this Honorable Court on the second Monday of October, 1885, and show cause why the judgment rendered against said petitioners in that cause should not be reversed; which writ was served upon said Frederick Eggers on the —— day of January, 1885.

WALTER Q. GRESHAM.

10 original 14 - 174

In the Supreme Court of the United States.

EX PARTE

DAYTON S. MORGAN AND
C. ASHLEY SMITH.

Copy of Petition for Mandamus

EDWARD ROBY, COUNSEL.

SANDY BROTHERS, PRINTERS, 168 AND 170 MADISON STREET.

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1884.

Exparte. DAYTON S. MORGAN and
E. ASHLEY SMITH.

PETITION FOR A MANDAMUS to the Judges of the Circuit Court of the United States in and for the District of Indiana, commanding them to amend and reform a judgment entry to conform to the pleadings and finding, or verdict.

To the Judges of the Supreme Court of the United States.

The petition of Dayton S. Morgan and E. Ashley Smith respectfully showeth that on the 26th day of July, A. D. 1882, your petitioners filed in the Circuit Court of the United States for the District of Indiana, and duly entitled in said court their certain

DECLARATION IN EJECTMENT,

(as is shown by accompanying exemplification at page 1), in the words and figures following, to-wit:

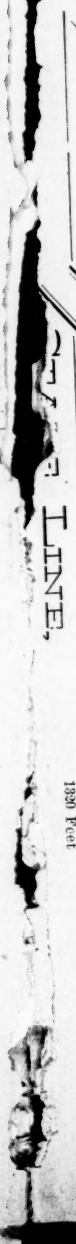
The plaintiffs, Dayton S. Morgan and E. Ashley Smith, citizens of the State of New York, complain of the defendant, Frederick Eggers, a citizen of the State of Indiana, and say: that they, plaintiffs, as tenants in common, are the owners in fee simple, and entitled to the possession of the following described real estate in the County of

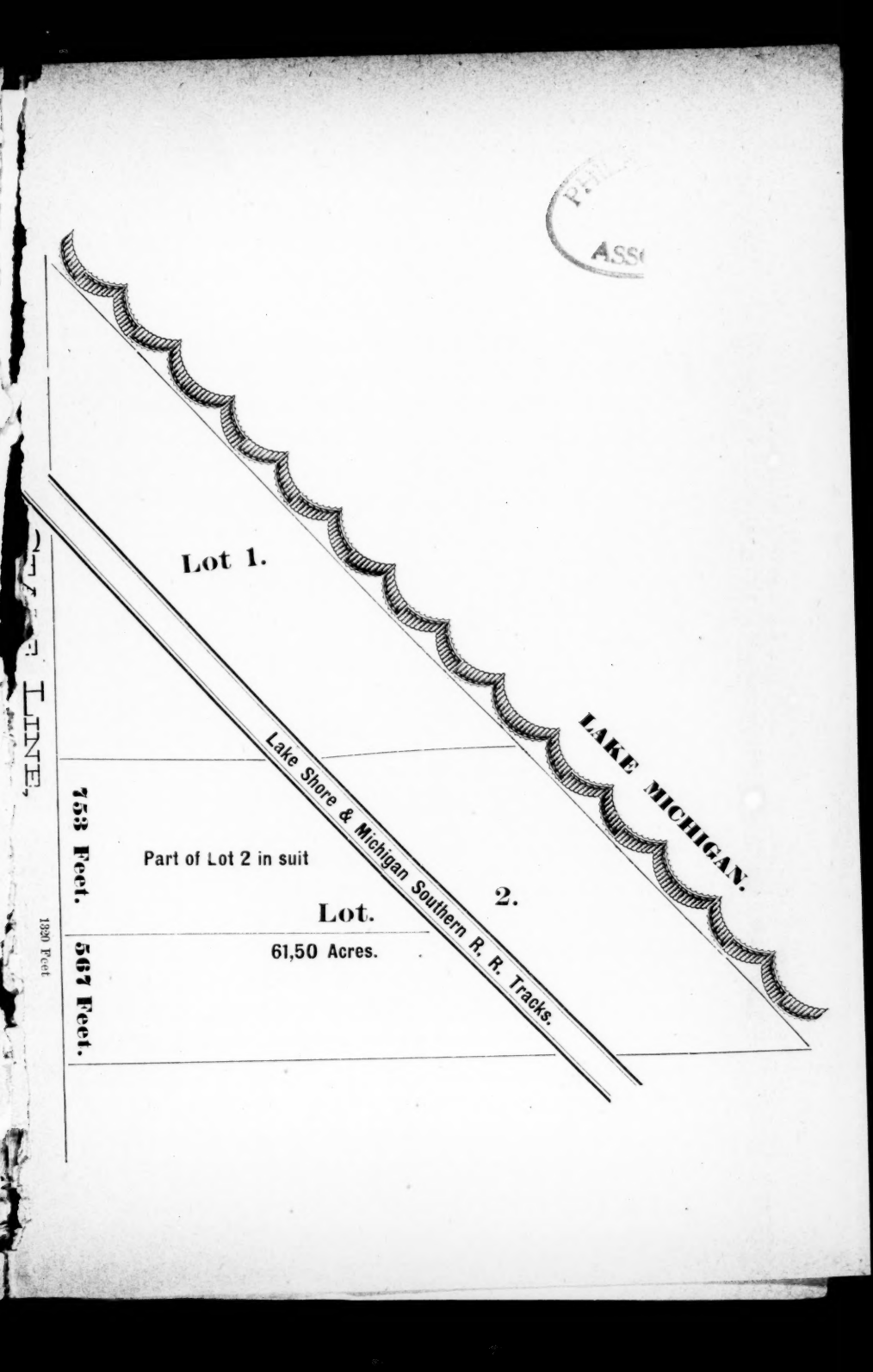
Lake, in the State of Indiana, at the district aforesaid, to-wit: *All of the north part* of Lot two (2), in Section thirty-six (36), Township thirty-eight (38) north, of Range ten (10), west of the second principal Meridian, *which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot Two* (2), *and seven hundred and fifty-three* (753) *feet south therefrom.* That the defendant, Frederick Eggers, at the District aforesaid, now holds possession of the said described real estate, without right, and for more than a year past has unlawfully kept the plaintiffs out of possession;—Wherefore the plaintiffs demand judgment for the recovery of said real estate, and two thousand dollars damages for being kept out of possession, and for other proper relief.

U. J. HAMMOND,
Att'y for Plaintiffs.

And thereupon said defendant was summoned to answer these petitioners "*in a plea of Ejectment,*" (as is shown by accompanying Exemplification at page 2–3).

The following is a plan of said Lot 2, showing the *parcel* thereof for which said suit was brought.




Lot 1.
LAKE MICHIGAN.
Lake Shore & Michigan Southern R. R. Tracks.
Part of Lot 2 in suit
Lot.
2.
61,50 Acres.
753 Feet.
567 Feet.
1320 Feet

OCIATIO

THE REVISED STATUTES OF INDIANA contain the following provisions, enacted and in force September 19, 1881.

Sec. 335. "DEFINITION. The pleadings are formal allegations by the parties, of their respective claims and defenses, *for the judgment of the court.*"

"§ 336. DISTINCT FORMS ABOLISHED. All the distinct forms of pleading heretofore existing, inconsistent with the provisions of this act, are hereby abolished; and hereafter the forms of pleadings in civil actions in Courts of Record, and the rules by which the sufficiency of the pleadings, is to be determined, are modified as prescribed by this act."

"§ 337. WHAT ALLOWED. The only pleadings allowed are: *First*, the complaint by the plaintiff; *second*, the demurrer and answer by the defendant; *third*, the demurrer and reply by the plaintiff."

"§ 338. COMPLAINT—CONTENTS—PARAGRAPHS NUMBERED —The first pleading on the part of the plaintiff is the complaint. The complaint shall contain: *First.* The title of the cause, specifying the name of the court, and the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. *Second. A statement of the facts constituting the cause of action* in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. *Third.* Where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered. *Fourth. A demand of the relief* to which the plaintiff may suppose himself entitled. If the recovery of money be demanded the amount thereof shall be stated."

"§ 363. The Court, * * may, in all proper cases, upon motion, order a bill of particulars of the claim of either party, and *abstracts of title to be furnished.*"

"§ 1050. ACTION FOR POSSESSION. Any person, having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same, by action, to be brought against the tenant in possession."

"§ 1054. CONTENTS OF COMPLAINT. The plaintiff in his complaint, shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession."

"§ 1055. ANSWER IN DENIAL—EFFECT. The answer of the defendant may contain a denial of each material allegation or statement in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, legal or equitable."

"§ 1056. Where the defendant makes defense it shall not be necessary to prove him in possession of the premises."

"§ 1057. The plaintiff must recover on the strength of his own title."

"§ 1060. * The plaintiffs may recover, against one or more of the defendants, the premises, *or any part thereof*, or interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than that claimed."

"§ 1064. NEW TRIAL OF RIGHT—BOND. The court rendering the judgment, on application made within one year thereafter by the party *against whom* judgment is rendered, his heirs, assigns or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and damages, which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. The Court shall grant but one new trial under the provisions of this section."

[THIS WAS AN ACTION AT COMMON LAW.]

Which provisions governed the practice and proceedings in making up the issue to be tried; and your petitioners aver that though said declaration or complaint concluded as if praying for alternative relief, the said Action, so begun, was an "*action at common law*" as known and described in and by the *Constitution and Statutes of the United States.*

August 10, 1882, at the May term of said Circuit Court under the local practice of said State, as established by said Section 363 of the Revised Statutes of Indiana, the said defendant came into court by his attorney, and filed his motion in writing to require the plaintiffs in said cause

(your petitioners) to file an abstract of title therein; said motion being in the words following, to-wit:

MOTION FOR ABSTRACT OF TITLE.

"The defendant moves that the plaintiffs be ruled to file an abstract of title, showing their alleged title to said lands; to the end that he may be advised as to their pretended title to the lands in controversy.

A. C. HARRIS for Defendant."

(Which appears by accompanying Exemplification at page 4.)

Under said local practice of said State your petitioners on the 31st day of August, A. D. 1882, at the May term of said Court, filed in said court their *Abstract of title to the lands in controversy*, as particularly appears by the accompanying exemplification at pages 4–7.

Afterwards at the same term of said Court the defendant put in his *Answer* to said *Complaint* and *Abstract of title;* said answer being in the form and of the effect prescribed by said Section 1055, of the Revised Statutes of Indiana, above quoted, and being in the words following, to-wit:

ANSWER.

"The defendant for answer, denies every allegation in the complaint. A. C. HARRIS for Defendant."

(As shown in accompanying exemplification at page 7.)

[TRIAL.]

By Statute of Indiana, enacted September 19, 1881, and thence in force in said State, the following provisions constitute part of the local law of said State, viz: *Revised Statutes of Indiana*, § 545. "The verdict of a jury is either general or special. *A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant.* A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court."

"§ 550. JURY HOW WAIVED. The trial by jury may

be waived by the parties, in all actions, in the following manner: *First.* By failing to appear at the trial. *Second.* By a written consent in person or by attorney, filed by the clerk. *Third. By oral consent in open court, entered on the record.*"

"§ 551. SPECIAL FINDING BY COURT. Upon trials of questions of fact by the Court, it shall not be necessary for the Court to state its finding, except generally *for the plaintiff or defendant* unless one of the parties request it, with a view of excepting to the decision of the Court, upon the questions of law involved in the trial; in which case the Court shall *first* state the facts in writing, and *then* the conclusions of law upon them, and judgment shall be entered accordingly."

"§ 552. The provisions of this Code respecting trials by jury apply, so far as they are applicable, to trials by the Court."

"§ 564. When a trial by jury has been had, and a *general verdict rendered, the judgment must be inconformity to the verdict.*"

"§ 565. Where the verdict is special, or *where there has been a special finding on particular questions of fact*, the court shall render the proper judgment."

It is decided and determined by the Supreme Court of the said State of Indiana, and was so established before the proceedings hereinafter referred to, that a finding by the court, not made at the request of either or any of the parties is not a special finding, to wit: in *Northcutt v. Buckles*, 60 Ind., 577; *Caress v. Foster*, 62 Ind. 145.

For convenience petitioners beg leave to quote UNITED STATES REVISED STATUTES:

"SEC. 648. The trial of issues of fact in the Circuit Courts *shall be by jury*, except in cases of equity, and of admiralty and maritime jurisdictoin, and *except* as otherwise provided in proceedings in bankruptcy, and *by the next section.*"

"SEC. 649. Issues of fact in civil cases in any Circuit Court, may be tried and determined by the court without the intervention of a jury, wherever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. *The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.*"

Your petitioners further show that the issue in said case was an issue of fact only, and was made up by the said declaration of the plaintiff and said plea of the defendant; (or in the language of the local practice of Indiana by the said complaint of the plaintiff, and said answer of the defendant). And said issue being so made up by the record, the parties thereto waived a trial by jury, and submitted the said issue of fact to the court for trial, at the November Term of the said Circuit Court, A. D. 1882, and the Court at said November term A. D. 1882, to-wit, on the 20th day of January, A. D. 1883, under and by the authority of said SECTION 649 *of the Revised Statutes of the United States* tried said issues without the intervention of a jury, and thereupon after said trial, the court having heard the evidence and being fully advised, found "for the plaintiffs" upon the said issue; and so the said finding was delivered and entered of record in said court. The said finding or verdict, being in the form prescribed by Sections 545 and 551 of the Revised Statutes of Indiana, had all the effect of a general verdict of a jury, for the plaintiff and against the defendant, upon all the issues submitted to the court by the pleadings in said cause, by reason of the commands of said Section 649 of the Revised Statutes of the United States, that "the finding of the court, upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And, there being no motion for new trial, interposed before judgment was ordered on said verdict or finding, the clerk of said Circuit Court entered and recorded it as the

JUDGMENT

of the said Circuit Court upon said issues and finding thereon, that said court *ordered* and *adjudged* that said plaintiffs "are entitled to and shall have and recover of defendant "the possession of *so much of said lot* 2 *as lies south of* "*the south line of lot number One* (1) *as indicated by a* "*fence constructed and maintained by the defendant as* "*and on said south line. Said fence running from the* "*state line easterly to Lake Michigan*, and assesses the "damages at $1.00 and costs taxed at $——— which the "plaintiff shall recover of defendant. All of which is "finally ordered adjudged and decreed."

Which submission, finding and judgment entry are shown by the exemplification of the record of said cause, herewith submitted as part of this petition, at pages 7 and 8.

You petitioners show that said judgment entry is a complete *departure* from the declaration and issues and the finding thereon, in that it gives judgment for some 30 acres of land not mentioned or embraced in the declaration answer or verdict, including therein the portion of the tracks of the Lake Shore and Michigan Southern Rail Road which cross said lot 2, which form part of the main tracks thereof, and which are thus part of one of the great trunk lines of the country; and also, in that *said judgment entry is, covertly and secretly, a judgment for the defendant as to all the lands sued for, which are worth more than five thousand dollars, based on a verdict and finding for the plaintiffs, upon all the averments of the declaration, as to their title to and right to possession of said lands therein sued for.*

Your petitioners further show that it had been established long before the time of said trial and was then the law of Indiana, that, upon such an issue, evidence as to the line between lots one and two, was entirely irrelevant to the issue, as particularly appears by the decisions of *Applegate v. Doe*, 2 Ind. 169, p. 170; *Voltz v. Newbert*, 17 Ind. pp. 190–1; *Doe v. Hall*, 2 Ind. 24, and as at common law, the question of boundary could not be tried, (*Doe v. Wilson*, 2 Starkie, 477; *Cottingham v. King*, 1 Burrow, 623, p. 630–1); the court had nothing to do with the location of the boundary. (*Farrow v. Farrow*, 2 J. J. Marshall, 388; *Simpson v. Shannon*, 5 Littel, 322, p. 324).

Your petitioners further show that afterwards your petitioners filed in said Circuit Court their Motion in the words and figures following to-wit:

MOTION.

The plaintiffs in the above entitled cause, Dayton S.

Morgan and E. Ashley Smith, move the court to amend and reform the judgment entered in the above entitled cause at the November Term of this court, 1882, on the 20th day of January, 1883, so that said judgment shall conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause.

UPTON J. HAMMOND AND EDWARD ROBY,
Attorneys for said plaintiffs.

To which motion, the defendant Fredrick Eggers appeared, and the same was argued by his counsel, on his behalf, and on behalf of your petitioners it was submitted on a carefully prepared printed brief, and the judge holding the said Circuit Court, denied the said motion, and refused to order that said judgment be reformed, so as to conform to the complaint and the finding or verdict of the court on the issues; the said Circuit Court delivering an opinion giving his reasons for such denial; which motion and opinion were preserved by a bill of exceptions, of which a copy is embraced in the accompanying transcript or exemplification.

Your petitioners pray that said exemplification of said Record and Proceedings in said cause in said Circuit Court, herewith filed, may be taken as part of this petition.

WHEREFORE and inasmuch as the said Circuit Court has refused to cause said judgment entry to be amended so as to conform to the declaration and issues and the finding thereon, and as the law provides no other adequate remedy in the premises, your petitioners pray that the writ of mandamus may be issued and directed to the judges of the said Circuit Court, commanding and enjoining them to cause said judgment entry to be amended so as to conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause.

And especially commanding that said Circuit Court enter an order in the words and figures following or equivalent words, to-wit: It is ordered and adjudged by the court that the said judgment in said cause wherein Dayton S. Morgan and E. Ashley Smith were plaintiffs, and Frederick Eggers was defendant, entered on the 20th day of January A. D. 1883, at the November Term, A. D. 1882, be and

the same is hereby amended and reformed so that the same shall conform to the complaint and finding of the court, and from and after the record of the finding of the court for the plaintiffs shall read thus:

"Therefore it is considered and adjudged that they, said plaintiffs, as tenants in common, are the owners in fee simple of, and are entitled to, and shall have and recover of and from the defendant the possession of the said lands and premises in their complaint described, that is to say: All of the north part of Lot Two (2) in Section Thirty-six (36), in Township Thirty-eight (38) North, of Range Ten (10), West of the Second Principal Meridian, which lies west of the track of the Lake Shore and Michigan Southern Rail Road, and North of a line paralled with the North line of said Lot Two (2) and Seven Hundred and Fifty three (753) feet south therefrom; and also that plaintiffs do recover of said defendants their costs of this suit to be taxed. (Gilbert on Eject. p. 298).

Or that such other order may be had in the premises as justice may require.

And your petitioners will ever pray etc.,

EDWARD ROBY,
Counsel for petitioners.

DAYTON S. MORGAN,
E. ASHLEY SMITH.

State of New York, } ss. Dayton S. Morgan of Brockport,
County of Monroe, }
in said county being duly sworn says that the matters and things stated in the foregoing petition by him subscribed are true, according to the best of his knowledge and belief.
Sworn to before me this 26th day of November, A. D. 1884. } Dayton S. Morgan.

SEAL

Henry C. Hammond,
Notary Public.

State of New York, County of Niagara, ss.

E. Ashley Smith, of the City of Lockport, in said County, being duly sworn, says: that the matters and things stated in the foregoing petition by him subscribed, are true according to the best of his knowledge and belief.

E. Ashley Smith.

Sworn to before me this 29th day of November, A. D. 1884.

SEAL

Garrit L. Lansing,
Notary Public, in and for said county.

EXEMPLIFICATION.

[Page 1]

Pleas of the Circuit Court of the United States for the District of Indiana begun and holden at the United States Court House in the city of Indianapolis, in said District on the First Tuesday of November, in the year of Our Lord One Thousand Eight Hundred and Eighty-two, before the Hoornable Walter Q. Gresham, Judge of the District Court of the United States for the District of Indiana and ex officio Judge of said Circuit Court.

Dayton S. Morgan and E. Ashley Smith
v.
Frederick Eggers.
} Ejectment.

Be it remembered that heretofore, towit: on the 26th day of July, 1882, at the May Term of said Court, the plaintiffs by U. J. Hammond, their attorney, filed their complaint in the above entitled cause in the words following, towit:

DECLARATION.

The plaintiffs, Dayton S. Morgan and E. Ashley Smith, citizens of the State of New York, complain of the defendant, Frederick Eggers, a citizen of the State of Indiana, and say that they, plaintiffs, as tenants in common, are the owners in fee simple, and entitled to the possession, of the following described real estate in the County of Lake, in the State of Indiana, at the District aforesaid, towit:

[2] All of the north part of lot two, (2) in Section thirty-six (36), Township thirty-eight north, of Range ten (10), west of the second Principal Meridian, which lies west

of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot Two (2), and seven Hundred and fifty-three (753) feet south therefrom.

That the defendant, Frederick Eggers, at the District aforesaid, now holds possession of the said described real estate without right, and for more than a year past has unlawfully kept the plaintiffs out of possession.

Wherefore the plaintiffs demand judgment for the recovery of said real estate, and two thousand dollars damages for being kept out of possession and for other proper relief.

U. J. HAMMOND,
Att'y for Plaintiffs.

SUMMONS AND RETURN.

And thereupon there issued out of the office of the clerk of said court a summons in the above entitled cause in the words following, towit:

United States of America, } ss.
District of Indiana. }

The President of the United States.

To the Marshal of the District of Indiana, Greeting:

You are hereby commanded to summon Frederick [3] Eggers if he may be found in your District to be and appear in the Circuit Court of the United States for said District to be holden before the judges thereof at Indianapolis 15 days after service hereof, to answer unto Dayton S. Morgan and E. Ashley Smith, citizens of the State of New York in a plea of ejectment.

Damages $2,000.00.

And have you then and there this writ.

SEAL

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States and the seal of said Circuit Court this 26th day of July, 1882.

Noble C. Butler, clerk.

And afterwards, to wit: on the 1st day of August, 1882, said summons was returned into said clerk's office, with the following return endorsed thereon, to-wit:

District of Indiana: I received this writ at Indianapolis, in said District at 11 o'clock A. M., on the 26th day of July, 1882, and served the same in Lake County as follows: on the 28th day of July, 1882, by reading to Frederick Eggers and delivered to him a true copy of the same, near South Chicago, Ills.

R. S. Foster, U. S. Marshal.
By W. G. Barneclo, Deputy.

DEFENDANT MOVES FOR ABSTRACT.

And afterwards, to-wit: on the tenth day of August, 1882, at the May Term of said Court, before the Honorable [4] Walter Q. Gresham, Judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the defendant by A. C. Harris, Esq., his attorney, and files his motion to require the plaintiffs to file an abstract of title herein.

And said motion is in the words following, to-wit:

MOTION.

The defendant moves that the plaintiffs be ruled to file an abstract of title showing their alleged title to said lands. To the end that he may be advised as to their pretended title to the lands in controversy.

A. C. Harris, for Defendant.

And afterwards, to-wit: on the 31st day of August, 1882, at the May Term of said court, in recess thereof, the following further proceedings in the above entitled cause were had, to-wit:

ABSTRACT OF TITLE.

Come now the plaintiffs by counsel and file an abstract of Title herein, in the words following, to-wit:

Abstract of Title to Lot 2, of S. W. $\frac{1}{4}$ of Section 36.

T. 38. N. R. 10 west. in Lake County, State of Indiana. This section is divided into four lots. of which Lot 2 falls in the southwest quarter of the section.

[5] United States to The State of Indiana.	Swamp Land Patent No. 4, Dated March 24, 1853, conveys said Section.
The State of Indiana to George W. Clarke.	Swamp Land Patent No. 5904, Dated July 3, 1854. Consideration, $76.88 conveys said Lot 2.
Last Will and Testament of George W. Clarke, who died Aug. 15, 1866	Recorded in Lake County, Indiana, December 26, 1866, conveys same land.
Jacob Forsyth and Robert D. Clark, Executors of the last Will of George W. Clarke, deceased, to Caroline M. Forsyth.	Executor's Deed Dated December 1, 1868 Consideration, $10,000.00, conveys said Lot 2 and other lands.
Sarah J. Clark and Harriet S. Clark to Caroline M. Forsyth.	Quit Claim Deed, Dated Dec. 1, 1868. Conveys all right, title and interest in all the lands belonging to the estate of George W. Clarke, deceased.
Robert D. Clark and wife to Caroline M. Forsyth.	Quit Claim Deed, Dated December 1, 1868, conveys all right, title and interest in and to all the lands belonging to the estate of George W. Clarke, deceased.
[6] Henry F. Clarke and wife to Caroline M. Forsyth. W. Clark, deceased.	Quit Claim Deed, Dated Dec. 1, 1868, conveys all right, title and interest in all the lands belonging to the estate of George
Caroline M. Forsyth and husband to Daniel A. Jones, Oramel S. Hough, Charles M. Culbertson and Charles L. Raymond.	Warranty Deed, Dated March 9, 1869. Consideration $11,038.30, conveys said Lot 2 and other lands.

Charles L. Raymond 9 to Herbert B. Reed.	Deed Dated July 15, 1869. Consideration $5,000.00, conveys the undivided one-fourth

of said Lot 2 with other lands.

Daniel A. Jones and wife, Charles M. Culbertson and wife, Oramel S. Hough and wife and Herbert B. Reed, 10 to Edward Roby.	Deed Dated July 15, 1873. Consideration $63,076, conveys said Lot 2 with other lands.
Edward Roby 11 to Dayton S. Morgan.	Deed Dated Aug. 7, 1873. Conveys said Lot 2 withother lands.
[7] Dayton S. Morgan and wife 12 to E. Ashley Smith.	Deed Dated January 17, 1877, conveys one undivided half of said Lot 2 with other lands.

DEFENDANTS PLEA.

And afterwards, to-wit: on the 10th day of October, 1882, at the May Term of said Court before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the defendant by counsel and files his answer herein, in the words following, to-wit:

The defendant for answer denies every allegation in the complaint. A. C. Harris for defendant.

TRIAL.

And afterwards, to-wit: on the 20th day of January, 1883, at the November Term of said Court before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

(JURY WAIVED.)

Come the parties by counsel and by agreement this cause is submitted to the Court for trial.

(VERDICT.)

And the Court having heard the evidence and being fully advised finds for the plaintiffs,

(JUDGMENT,)

and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot 2 as lies south of the south line of Lot numbered one (1) as indicated by a fence constructed and maintained by the [8] defendant as and on said south line said fence running from the State Line easterly to Lake Michigan, and assesses the damages at $1 00 and costs taxed at $——, which the plaintiffs shall recover of defendant.

All of which is finally ordered adjudged and decreed.

(APPLICATION TO REFORM JUDGMENT)

And afterwards, to-wit: on the 27th day of June, 1884, the following Bill of Exceptions was allowed and filed in said cause, to-wit:

Be it remembered that on the 23d day of April, 1884, the plaintiffs, Dayton S. Morgan and E. Ashley Smith, filed in the above entitled cause their motion in writing to the Court for the reformation, correction and amendment of the judgment of the Court in said cause which motion is in the words and figures following, to-wit:

MOTION.

"The plaintiffs in the above entitled cause, Dayton S. Morgan and E. Ashley Smith move the court to amend and reform the judgment entered in the above entitled cause at the November Term of this Court, 1882, on the 20th day of January, 1883, so that said judgment shall conform to

the complaint in said cause and to the finding or verdict of the court, rendered upon the trial of said cause.

UPTON J. HAMMOND, EDWARD ROBY,
Attorneys for said plaintiffs."

ORDER DENYING MOTION.

And upon appearance to said motion by the defendant, Frederick Eggers, and argument thereof by his and plaintiffs' respective counsel said motion was overruled by the court, the Court filing the following opinion in that behalf:

OPINION.

"Motion to amend judgment.—WOODS *Dist. Judge.*

Morgan and Smith sued Eggers in ejectment for the [9] recovery of real estate described as follows: "All of the north part of lot two (2) in, section thirty-six (36), etc., which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2), and 753 feet south therefrom." The defendant answered by a general denial and upon the issue so joined, a jury being waived and trial had by the court a finding and judgment of the tenor following were entered. "Come the parties and by agreement this cause was submitted to the court for trial; and the court having heard the evidence, and being fully advised finds for the plaintiff and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the South line of lot one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, etc."

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this, the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the [10] fence constructed by the defendants should be expunged.

It was competent for the court under the issue to find to what extent the defendant was guilty, or had held unlawful possession of the premises described, and if under the evidence it appeared that a fence had become or was the boundary of such occupation, it was proper that the fact should be stated as finding and judgment of the court.

The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning however is clear. It is as if the entry read in this way:

"And the Court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant, etc." "The motion for correction is therefore overruled."

To which action and opinion of the Court, the plaintiffs now here at the time except, and pray that this their Bill of Exceptions in that behalf may be allowed which is accordingly done, and upon their motion the same is ordered to be made a part of the record in this cause.

June 27, 1884. William A. Woods,
U. S. Dist. Judge.

[11] United States of America, } ss.
District of Indiana. }

I, Noble C. Butler, clerk of the Circuit Court of the United States, in and for said District, do hereby certify that the above and foregoing are full and true copies of the Complaint, Summons, Motion of Defendant, Abstract of Title filed by plaintiff, Answer of Defendant, Judgment of the Court and Bill of Exceptions in the case of Dayton S. Morgan, et al, against Frederick Eggers, as fully as the same remain upon the files and records now and in my office.

Witness my hand and the seal of said Court at Indianapolis, in said District, this 23d day of August, A. D. 1884.

NOBLE C. BUTLER,
CLERK.

SEAL

10:30

114-174

Office Supreme Court U. S.
FILED.
MAR 23 1885
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

EX PARTE DAYTON S. MORGAN, AND
E. ASHLEY SMITH.

Brief in Support of Petition.

EDWARD ROBY, COUNSEL.

SANDY BROTHERS, PRINTERS, 168 AND 170 MADISON STREET.

In the Supreme Court of the UNITED STATES.

EX PARTE DAYTON S. MORGAN, AND
E. ASHLEY SMITH.

BRIEF FOR PETITIONERS.

STATEMENT OF CASE.

This is an application for a *mandamus*, to the Judges of the Circuit Court of the United States for the District of Indiana, commanding them to amend and reform a judgment entry, to conform it to the pleadings and finding, or verdict.

Printed copies of the petition, embracing an Exemplification of the Record of the Circuit Court, are filed, and references below made are to the pages of such printed copies.

The local statutes of Indiana which affect the case, are copied in the petition, and printed in the copies thereof, showing that the essential steps of common law trial are jealously preserved.

Petitioners, as plaintiffs in Ejectment, by their declaration, or complaint, alleged that they were owners in fee

simple, and entitled to the possession of *all the north part* of Lot 2, in Sec. 36, T. 38, N, R. 10 W. etc., which lies *west of the track of the Lake Shore and Michigan Southern Rail Road and north of a line parallel with the north line of said Lot, and* 753 *feet south therefrom*: that the defendants held possession of the said described real estate without right, and unlawfully kept the plaintiffs out of possession; and plaintiffs asked judgment for the recovery of said land. (Petition, pp. 1, 13).

The lot extends from the state line to Lake Michigan, and contains 61.50 acres; about 20 acres of which are south of the south line of the land sued for, and about 20 acres are east of said railroad; making 40 acres of said lot outside of the land described in the declaration. (See plat in petition, pp. 3, 9).

The local practice of Indiana, authorizes, that the plaintiff, in ejectment, be required to furnish an abstract of his title; and the defendant, before pleading to the action, made a written motion: "that the plaintiffs be ruled to file an ab-"stract of title, showing their alleged title to said lands, to "the end that he (defendant) may be advised, as to their "pretended title, to the lands in controversy." (Petition, pp. 6, 15). Such abstract of title was filed, and appears in full in the Exemplification. (Petition, p. 15–17).

Then the defendant put in a plea of general issue, called an answer, in these words: "*The defendant for answer denies every allegation in the complaint.*" (Petition, pp. 6, 17).

The form, of the complaint and answer, are prescribed by the local statute, shown in the petition. (pp. 4, 5). By that statute, *their effect* is substatially the same as a declaration in Ejectment and plea of *not guilty*, at common law. (Petition, p. 5).

There was nothing in the pleadings, that put in issue, in any form, the location of the boundary line of the lot, or made any evidence, as to its location, relevant. The local

law made the defendants pleading an admission, that he was in possession of the land sued for. (R. S. Ind. § 1056 Petition p. 5). By the local law, any evidence, as to the boundary, was entirely irrelevant to the issue. (*Applegate v. Doe*, 2 Ind. 169, p. 170; *Volts v. Newbert*, 17 Ind. pp. 190–1; *Doe v. Hall*, 2 Ind. 24). At common law, the question of boundary could not be tried on those pleadings. (*Doe v. Wilson*, 2 Starkie, 477; *Cottingham v. King*, 1 Burrow, 623, p. 630–1; *Conner v. West*, 5 Burr. 2672). The court had nothing to do with the location of the boundary. (*Farrow v. Farrow*, 2 J. J. Marshall. 388; *Simpson v. Shannon*, 5 Littel, (Ky) 322, p. 324).

By the local statute, (Ind. R. S. § 1060) the plaintiff may recover against the defendant the premises, or any part therof. (Petition p. 5). This statute only affirmed the common law. (Gilbert on Ejectment, 93–4).

The case being the common action of Ejectment, at issue on a *declaration*, for land distinctly described, a naked plea of *general issue*, and a confession that the defendant was in possession of the land sued for, a jury was waived; and the finding of the court as entered of record is in these words: "*And the court having heard the evidence, and be-*"*ing fully advised, finds for the plaintiffs.*" (January 20, 1883).

Upon this, the clerk being ordered to enter judgment, recorded the judgment in the following words: "And "*Orders* and *Adjudges* that they are entitled to, and shall "have and recover, of defendant, the possession of *so much* "*of said lot two* (2) *as lies south of the south line of lot* "*number one* (1), *as indicated by a fence constructed and* "*maintained by the defendant as and on said south line.* "*Said fence running from the State line easterly to Lake* "*Michigan*, and assesses the damages at $1, and costs tax-"ed at $— which the said plaintiffs shall recover of said "defendant, all of which is finally ordered, adjudged, and "decreed." (Petition, pp. 8, 17–18).

In point of fact, this is a complete departure from the declaration; being a judgment for some 30 acres of land not mentioned in the declaration; and being no judgment whatever as to the land mentioned in the declaration. (Petition, pp. 3, 9). If dictated by defendant's attorney, it is *a fraudulent judgment*, intended to let the defendant keep all the lands sued for, without giving any intimation on the face of the judgment, that there is any judgment or finding against the plaintiff, for any part of the land described in the declaration. (Petition, p. 9). Yet this effect, (which is clearly possible) cannot be ascertained from the record of the judgment. What is the judgment, as to possession of the land sued for, cannot be determined from the judgment entry itself, but only by parol evidence dehors the record. Such form may be used for what is called by an old writer, "*stealing land by subtlety.*"

Afterwards, the plaintiffs moved the Circuit Court to amend and reform the judgment, and make the same conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause. This motion was carefully argued, but was denied; the district judge delivering the following

OPINION:

"Motion to amend judgment.—Woods *Dist. Judge.*

Morgan and Smith sued Eggers in ejectment, for the recovery of real estate described as follows: "All of the north part of lot two (2), in section thirty-six (36), etc., which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2), and 753 feet south therefrom." The defendant answered by a general denial, and upon the issue so joined, a jury being waived and trial had by the court, a finding and judgment of the tenor following were entered: "Come the parties and by agreement this cause was submitted to the court for trial; and the court having heard the evidence, and being fully advised *finds* for

the plaintiffs; And *Orders* and *Adjudges* that they are entitled to, and shall have, and recover of defendant, the possession of so much of said lot two (2) as lies south of the South line of lot one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, etc."

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this, the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendants, should be expunged.

It was competent for the court, under the issue, to find to what extent the defendant was guilty, or had held unlawful possession of the premises described; and if under the evidence it appeared that a fence had become or was the boundary of such occupation, it was proper that the fact should be stated as finding, and judgment, of the court.

The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning however is clear. It is as if the entry read in this way:

"And the Court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant, etc." "The motion for correction is therefore overruled." (See Petition, pp. 10, 18, 19).

So the Judge, holding the Circuit Court for the District of Indiana, opines: that the forms, and methods of proceeding, adopted and established by the common law, and which are essential, to preserve the methods of trial, prescribed by the laws of the United States, and the certainty of court records, form no part of the law of that court; that the suitors from other states, or the defendants who may be compelled to yield to its jurisdiction, by the process of the

United States, have no rights which its judges are bound to respect, as to the course of the verdicts and judgments; but that those judges are at liberty to confound verdict and judgment; and, by introducing confusion into the simplest and clearest proceeding known to the law, to render a judgment in form in favor of a party, though in fact, against him, in such terms that on the record, he shall have no redress.

The opinion puts us to our primer lessons. If it was not that of an officer in high judicial place, we would say little. But as it is the deliberate opinion, of the presiding Judge of the United States, in a great state, that legal rights are trifles, and *the system* of administrating justice is an indifferent matter, we will essay in argument, to show what the system is, and *why* it is essential to substantial justice.

ARGUMENT.

Petitioners believe that they are entitled to a remedy.

The Circuit Court denies them a remedy.

Their remedy is through WRIT OF ERROR or MANDAMUS.

Where *Mandamus* is the proper remedy, *Error* will not lie. (*Insurance Co. v. Comstock*, 16 Wallace, 258).

The judgment is in these words:

THE COURT "*Orders* and *Adjudges that they* are entitled to, and *shall have and recover of defendant* the possession of *so much of said lot two* (2) *as lies south of the south line of lot number one* (1) *as indicated by a fence constructed and maintained by the defendant as and on said south line. Said fence running from the State line easterly to Lake Michigan*, and assesses the damages at $1, and costs taxed at $— which the said plaintiffs shall recover of said defendant all of which is finally ordered, adjudged and decreed."

That this judgment entry is wrong is evident.

[1] There was no averment of damages in the declaration; no issue on their amount. No evidence could have been given to show damages or amount. Whatever may be the practice in State courts, this action was begun in the federal court; and in federal courts the Court of Error allows no departure from the rule, that the judgment must be based on averment. (*Harrison v. Nixon*, 9, Pet. 503. *Graham v. Bayne*, 18, How. 61–2).

[2] The judgment is for more land, and is for different land, from that described in the declaration.

The law is, that the subdivisions of public lands touching an Indian boundary line, or water course, or other natural obstruction, shall bound thereon (2 U. S. Stat. at large 313–4, Doe v. Hildreth, 2 Ind. 274, pp. 280–3). The court will take judicial cognizance of Lake Michigan and its character; and that if lot 2 reaches Lake Michigan, the lake is necessarily its external boundary. So too the State Line. If lot 2 touches the State Line, it is necessarily bounded by that line. (4 Stat. at Large 663). It is the fact that Lot 2 is bounded on the west by the State Line, and on the east by the lake. (See *plat* Petition p. 3).

The Lake Shore and Michigan Southern Railroad is mentioned in the declaration It the road runs in Lake Michigan outside of the line of lot 2, it could not be a boundary. If it runs upon lot 2, it must occupy or cut off some portion; and it was only that part of lot 2, west of that part, of the lot, thus occupied or cut off by the railroad, that was described, and sued for in the declaration.

Again: the declaration did not describe all that part of the lot lying west of the railroad; but only *that part* of so much of the lot situate west of the railroad, as lies *north of a certain line.*

The declaration being for *only that part* of Lot 2 lying *west* of the railroad and *north* of the line fixed; *the judg-*

ment is for *all* of lot 2 that lies south of the south line of Lot 1, extending through from the State Line to Lake Michigan.

The court will take cognizance of the fact that in government surveys, lot 2 can not include any part of lot 1. (*Brown v. Clements*, 3 How. 650, pp. 663–5). And if the South line of lot 1, extending from the State Line to Lake Michigan, is the *north* boundary of any part of Lot 2; it is, for that extent, the north boundary of the whole lot. (*Ibid.* 3 How. 663–5, *and the Statutes and Orders there cited and construed*). The shore of Lake Michigan runs along this lot from Northwest to Southeast; so that there is a small portion in the East end that is not exactly south of the straight north line of the lot, extending from the State Line to Lake Michigan.

The judgment is for *all* lot 2, except this little East point, and includes not only the land occupied by the railroad and that cut off by the railroad; but it also includes all that part of Lot 2, lying south of the line designated in the declaration, as the south line of the piece sued for.

[3] The insertion in the judgment of the words, "as "indicated by a fence constructed and maintained by the "defendant, as and on said south line, said fence running "from the State Line easterly to Lake Michigan," was improper. (This will fully appear on the argument *post*).

Applegate v. Doe, 2 Ind. 169, 170.
Voltz v. Newbert, 17 Ind pp. 190–1.
Doe v. Hall, 2 Ind. 24.
Farrow v. Farrow, 2 J. J. Marsh. 388.
Simpson v. Shannon, 5 Littel, 324.
Doe v. Wilson, 2 Starkie 477.
Cottingham v. King, 1 Burrow, 623, p. 629.
Connor v. West, 5 Burr. 2672.

It is apparent that the defendant can prosecute a writ

of error, and can certainly procure the reversal of the judgment, unless it can be saved by amendment, and the statute of jeofails, as was done in the case of *Woodward v. Brown*, 13 Peters, 1.

The plaintiffs have not only, a strong interest,—*they have a right, to have a judgment, free from error;* and free from surplusage, *or false entries, that may mislead, or operate to their prejudice.*

What is their remedy ?

Touching ejectment, the statute of Indiana (§ 1064 Petition p. 5,) provides: "The court rendering the judg-"ment, on application made within one year thereafter, *by* "*the party, against whom judgment is rendered,* * * "shall vacate the judgment and grant a new trial"

Two things! The court can not sit as a court of error. It can not vacate the judgment and let the verdict stand; but must set aside the verdict and issue a *venire de novo*, so that the case will be tried, as if there had never been a trial.

This statute seems to be applied, by the federal court, to trials in ejectment, before it. Where the Circuit Court of the United States, adopts the process pointed out by a State law, there must be no essential variance. Such a variance is a new rule, unknown to any act of Congress, or the State law, professedly adopted. (*McCracken v. Hayward*, 2 How. 608).

The law, then, gave no right to any party to have the judgment set aside, but to the one, *against* whom, the judgment was rendered.

The verdict, in our case, is "for the plaintiffs" on the whole issue.

There is not a word, in the judgment, indicating that it is against the plaintiffs. The plaintiffs, having no judg-

ment against them, could not, under that statute, have the judgment set aside.

The verdict was for them. They can never get a stronger verdict than that. Why should they be compelled to jeopardize their verdict, when after another verdict, for them, the clerk may write out the same identical judgment? Why should the government be put to the expense of holding court, for the purpose of repeating the same operation?

Neither the letter nor the spirit of the statute intended it to be a remedy for any such case as this. *The plaintiffs could not resort to this statute to rectify this judgment.*

Is their remedy by Writ of Error or *Mandamus?*

It seems that where a verdict is sufficent, the Supreme Court may render judgment on the verdict.

Barnes v. Williams, 11 Wheaton, 415.

A party in whose favor judgment is rendered may prosecute a Writ of Error for its reversal.

But, if either party should prosecute a Writ of Error to reverse this judgment, the only error that could be assigned, is the variance between the judgment and the verdict; and the opposite party, if he did not wish to pay the costs of a reversal, could move the Circuit Court to make the amendment here prayed, or could procure that amendment to be made in the Supreme Court, and the judgment of the Circuit Court entered January 20, 1883, would be affirmed as in the cases cited, viz:

Woodward v. Brown, 13 Peters, 1, 2.
Bank of Ky. v. Ashley, 2 Peters, 327.
Miller v. Royce, 60 Ind. 189.
The State v. Cross, 6 Ind. 387.
Sherman v. Nixon, 37 Ind. 154.

The power to amend, and corresponding rights, are expressly affirmed by statute; they were given by the common law.

United States Revised Statutes Sec. 954: "No sum-"mons, writ, declaration, return, process, *judgment*, or "other proceedings in civil causes *in any court* of the "United States, shall be abated, arrested, quashed *or re-*"*versed, for any defect* or want of form * * and such "court *shall* amend every such defect and want of form."

This refers to the court in which the record remains, and *the statute is mandatory.*

The court has no more power to make the amendment after error brought, than before. The statute did not intend that a party should wait, till his judgment should be assailed, before moving for amendment. It did not intend that the dockets of this court should be incumbered with records, merely to permit the inferior courts obey it, by amending defects in their records.

Though the judgment is for damages without averment, though is is for more land, and different land from that described in the declaration, though it inserts a boundary about which there was no averment, and as to which evidence would have been wholly irrelevant, though it does not follow the declaration and verdict, the Circuit Court for the District of Indiana, has deliberately refused to correct the judgment.

In *ex parte Crane*, (5 Peters 192), this court quoted from Blackstone, that *the Writ of Mandamus* "issues to "the judges of any inferior court, commanding them, to do "justice according to the powers of their office, whenever "the same is delayed. For it is the peculiar business of the "Court of Kings Bench, to superintend all other inferior "tribunals, and therein to enforce the due exercise of those "judicial or ministerial powers, with which the crown or "legislature have invested them: and this, not only *by re-*"*straining their excesses*, but also by quickening their neg-"ligence, and *obviating their denial of justice.*"

MANDAMUS *seems to be the proper remedy.*

Have petitioners a right to a Mandamus?

That is to be determined *by the record.*

The opinion of the Judge of the Circuit Court is, that "the finding and judgment, in this instance, are not separate "and distinct." He says: "perhaps it would have been better to make them so,"—intimating a doubt on that subject. He says: "It is as if the entry read in this way: "And the court having heard the evidence, etc., finds and "orders and adjudges that the plaintiffs are entitled to, and "shall have and recover of the defendant, etc." He leaves the whole formal finding, *for the plaintiffs* on the evidence, out of his calculation.

The common law can only be annulled by statute. It cannot be set aside, and other courses adopted at the caprice of Circuit or District Judges. It is the rigid law of the courts of the United States; necessary to preserve each man's rights, and to allow all people to understand their rights, and courts and officers to administer the law, throughout the wide extent of the national jurisdiction.

Whether error will lie, depends on the question; whether writing out the judgment which follows upon a verdict or finding on the issue, is a ministerial or judicial act. Short v. Coffin, 5 Burr. 2730.

The Bank of Kentucky v. Wister, 3 Peters, p. 431.

The Judge, who delivered the opinion of court below, evidently thinks that there is no distinction between the functions of the judge and clerk; that there is no *necessary* distinction, between the verdict, or the finding which stands for a verdict, and the judgment entry thereon.

The nature, of a judgment record, is such, that it can never be submitted to parol evidence, to determine which is the act of the court, and which is the act of the clerk. An appellate Court cannot take such evidence, to determine whether it can review a judgment, upon error assigned; or must dismiss the writ of error, because the matter complain-

ed of is the misprision of the clerk. Hence it is decided, that where the judge dictated the amount of the judgment, the computation was still the act of the clerk. *Sherman v. Nixon*, 37 Ind. 154.

A record imports verity, and can only be tried by itself, by bare impection. It cannot be assisted, or aided, or contradicted, or in any manner varied, by evidence, dehors the same.

Comyns, Digist *title* Record B. E. and F.
1 Inst. 260.
Co., Litt. 117 b.

Even the minutes, of rules and proceedings, made by the judge or clerk, cannot be received to explain or give effect to a record. Nor can other judgment records, made at the same time.

Crosswell v. Byrnes, 9 Johns. 287.
Young v. Thompson, 14 Ill. 380–1.
Waldron v. Green, 4 Wend. 409.
In re Negus, 10 Wend. 40.

In *Crosswell v. Byrnes*, (9 Johns. p. 288, note), it was attempted to introduce the testimony of the judge, as to the trial, and the manner in which the record had been made. But by the court it was held, that nothing could be asked that would affect the legal effect of the record.

"What the law requires to be done and appear of "record, can only be done and made to appear, *by the* "*record itself*, or an exemplification of the record."

Elliott v. Piersol, 1 Peters, p. 340.

Coke Inst. 260 a "Record, Recordum, is a memorial or "remembrance in rolls of parchment, of the proceedings "and acts of a court of justice, *which hath power to hold* "*plea according to the course of the common law* of real or "mixed actions," etc., * *

"And the rolls being the records or memorials of the "judges of the courts of record, import in them such in-"controllable credit and verity, as they admit no averment,

"plea, or proof to the contrary. And if such a record be "alleged, and it be pleaded that there is no such record, it "shall be tried only by itself; and the reason hereof is ap- "parent; for otherwise, (as our old authors say, and that "truly) *there should never be any end of controversies, "which should be inconvenient;* * but yet during "the term wherein any judicial act is done, the record re- "maineth in the breast of the judges of the court, and in "their remembrance, and therefore the roll is alterable dur- "ing that term, as the judges shall direct; but when that "term is past, then the record is in the roll, and admitteth "no alteration, averment or proof to the contrary."

In *Crosswell v. Byrnes*, (9 Johnson,) where it was attempted to vary the effect of the record, by an entry on the minutes, of a rule for judgment, the court said, p. 290: "to give an entry on the minutes that authority, would de- "stroy *the certainty, order* and *solemnity* of enrollments."

The Circuit Courts, of the United States, have power to hold pleas according to the course of the common law.

The machinery is adapted, to move in particular circles, and to produce particular results—the wheels to mash into the cogs of other wheels, in their several courses, to adjust themselves to each other and communicate the action of sovereign power and reciprocal right, according to the course of the common law. If particular states believe they have adopted new and useful improvements, they can be adopted in these courts, only as they come in, as parts of the original machine, to accomplish the results for which it was designed.

These are not only to grant or deny the prayer of a suitor, but to proceed *according to due course and process of law;* and to attain the result, with the certainty, *order*, and solemnity, which is required by the common law.

Where a matter of fact is mixed with matter of record, it must be tried by a jury (*Lytle v. Lee*, 5 Johns, 112; *Thomas v. Rumsey*, 6 Johns, p. 33; *Drinkwell v. Fowkes*,

1 Ld. Raym. 212). In the case at bar, if we were required to look outside of the record, petitioners would produce two witnesses who would testify positively, that the finding for the plaintiff was distinctly announced by the judge, and the judgment was entirely separate. Suppose that the judge, who tried the case, should testify to the contrary, it would be extremely unpleasant, though necessary, to treat him like any other witness, and impeach his testimony—

But we need not continue this line of thought. *The judgment records of the Circuit Court, of the United States, must be such, that they can be read without the assistance of the Judge of Indiana.*—they must be read, and understood, alone.

To ascertain which of this entry is verdict, and which judgment, we will recur to the iron forms of the common law; which law defines the power and function, of each part of *due course and process of law*, in ejectment.

1*st*. *The issue.*
2*d*. *The verdict.*
3*d*. *The judgment.*

The words recorded are:
The cause is submitted to the court for *trial*.—
The court *finds* for the plaintiffs.—
And *orders* and *adjudges* that they shall have and recover of defendant.—

THE ISSUE.

THE ISSUE IN THIS CASE, AND THE ONLY THING THE COURT HAD POWER TO TRY, WAS, WHETHER THE PLAINTIFFS WERE THE OWNERS IN FEE SIMPLE, AND ENTITLED TO THE POSSESSION OF THE LAND DESCRIBED IN THE DECLARATION. THE COURT HAD NO QUESTION ON THE BOUNDARY OF THAT PARCEL BEFORE IT.

TOMLIN LAW DIC. "*Issue* * generally signifies

"the point of matter issuing out of the allegations and "pleas of the plaintiff and defendant, in a cause. 1 Inst. "126; 11 Rep. 10."

"*An issue of fact is where the plaintiff and defend-*"*ant have agreed, upon a point, to be tried by a jury.*"

"An issue was called general, where the defendant pleaded the general issue, to the plaintiffs declaration."

To determine what the issue was, resort must be had to the pleadings.

Craig v. Missouri, 4 Peters, 410.

Stockton v. Bishop, 4 How. 155, pp. 167–8.

In *Garland v. Davis*, 4 How. p. 148, we read; "The "evidence must be limited to the plea. (Mar. Ins. Co. v. "Hodgson, 6 Cr. 206; 4 Wheat 64, in case of The Divina "Pastora). The court says: 'you must not admit the in-"'troduction of evidence varying fram the facts alleged' "(9 Peters, 483, Harrison v. Nixon). The *probata* should "conform to the *allegata*. (Boone v. Chiles, 10 Peters, "177)."

Again, in *Harrison v. Nixon*, 9 Peters, p. 503: "The "proofs must be according to the allegations of the parties; "and *if the proofs go to matters not within the allegations, "the court cannot judicially act upon them as a ground "for its decision;* for the pleadings do not put them in "contestation."

THE ISSUE IN EJECTMENT, in the locality of the case at bar, has been the subject of careful regulation, both by Rule of Court, and Statute.

At the common law, where the action was begun between fictitious parties, the courts compelled the person in possession, to enter into the consent rule, before they would permit him to make a defense. By this, he agreed that at the trial he would confess the lease, entry and ouster to have been made, as alleged in the declaration, and to rely solely on the merits of his title. ADAMS *on Eject.* [* 16].

"With respect to the conditions required from the party "appearing to the action, before he is permitted to be made "defendant, * * the object of this rule is to insure "a trial upon the merits * * the person appear- "ing specifies therein, for what premises he intends to "defend, and consents * to receive a declaration in "ejectment, and plead *not guilty*, (and) at the trial of the "issue, to confess lease, entry and ouster, *and possession "of the premises, in respect of which he defends*, and in- "sists *upon title only*." IBID. [* 267].

This was the common law as in force in Indiana in 1842, and prior to the statute revising the subject. *Rawley v Doe*, 6 Blackford, 143.

In the Seventh Circuit, (which included Indiana) by rule of the court, the defendant having entered into the consent rule, was bound to admit at the trial, that he was in possession, of the premises, claimed by the lessor of the plaintiff. Games v. Stiles, 14 Peters, 322 p. 332.

Lessee of Dunn v. Games, 1 McLean, 321, p. 328.

Upon the issue so made, the court adds: "*this "was not a dispute about boundaries, but of title;* and in "such a case, the rule referred to is salutary, and supersedes "the necessity, of proving the possession of the defendant."

(*Games* v. *Stiles*, 14 Peters, p. 333).

The general law, in such case, was thus stated by the Maryland Court of Appeals: "The appellee * *thereby* "*concedes the general identity of the premises in contro- "versy, and cannot controvert, under his general issue, the "location* of appellant's pretentions as set out in his Narr."

Tongues' Lessee v. Newell, 17 Md., 229.

Statutes, of Indiana, regulating the pleadings and practice, changed nothing of substance, but reduced this law to the utmost simplicity and *precision*.

Ind. R. S. §§ 1050, 1054, 1055, 1056, 1057, 1060, (Petition, p. 4, 5).

"§ 1050. ACTION FOR POSSESSION. Any person, hav-

ing a valid subsisting interest in real property, and a right to the possession thereof, may recover the same, by action, to be brought against the tenant in possession."

"§ 1054. CONTENTS OF COMPLAINT. The plaintiff in his complaint, shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession."

"§ 1055. ANSWER IN DENIAL—EFFECT. The answer of the defendant, may contain a denial of each material allegation or statement in the complaint; under which denial the defendant shall be permitted to give, in evidence, every defense to the action, that he may have, legal or equitable."

"§ 1056. Where the defendant makes defense, it shall not be necessary to prove him in possession of the premises."

"§ 1057. The plaintiff must recover, on the strength of his own title."

"§ 1060. * The plaintiffs may recover, against one or more of the defendants, the premises, *or any part thereof*, or interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than that claimed."

The declaration, in this case, claimed title in fee, to all of Lot 2, north and west of certain lines named. The defendant in moving for an abstract of title, expressly grounded the motion upon the claim of title, to the specific parcel described in the declaration. (Petition, p. 6). The answer or plea put the title to that specific parcel in issue. In the language of this court above cited, "this was not a dispute about boundaries, but of title" (14 Pet., 333); the court could not judicially act on evidence as to boundaries, "for the pleadings do not put them in contestation." (9 Pet., 503). The location of the south line of Lot 1, or of the dividing line between Lots 1 and 2, was in no manner be-

fore the court. In this also, the Indiana authorities agree with the authorities above cited.

We quote the language of their opinions:—

Applegate v. Doe, (2 Ind. 169, p. 170). "The de-"fendant * having admitted that he was in possession "of the lot sued for, there was but one question to be tried; "and that was, whether or not the (plaintiff) had legal title "to lot 105 or any part thereof?" * * * "The evidence relative to the line between lot No. 105 and "the adjoining one, was entirely irrelevant."

In Voltz v. Newbert, (17 Ind. pp. 191) it is said; This case is "*precisely in point*" (under the present statute) "because proof of possession, in the defendant, being "unnecessary, the boundaries of the land described by the "plaintiffs, are in effect conceded, and evidence tending to "prove their location must of course be deemed im-"material." (p. 190).

Doe v. Hall, (2 Ind. 24): Ejectment for the west half of Lot 104, in the town of Connorsville. "The plain-"tiff gave in evidence a deed of the property described in "the declaration, and there was further evidence, given "tending to show a dispute between the parties, as to the "location of the boundary line of the premises sued for, and "the adjoining lot; but as the defendant had confessed him-"self to be in possession of the premises sued for, we do not "see, if the plaintiff proved title thereto, how the question "about the boundary could well be got before the court."

This is in harmony with the general law. Upon the pleadings in this case, the question of boundary could not be tried. The court had nothing to do with the location of the boundary.

Tongue v. Newall. 17 Md 228–9.
Farrow v. Farrow, 2 J. J. Marshall, 388.
Games v. Stiles, 14 Peters, 333.

The plaintiffs are citizens and residents of the State of

New York, over 500 miles from the place of trial. The land is at the extreme north-west corner of Indiana (Petition p. 3), about 200 miles from Indianapolis, the place of trial. If upon the trial, the court sought to go into an investigation of the location of the boundary between lots 1 and 2, in the words of this court: "*it was illegally done*" (Garland v. Davis, 4 How. 148). Hence, presumption arises, that it made no such illegal investigation.

The issue, made by the pleadings, *was*: *whether the plaintiffs were the owners in fee simple, and entitled to the possession of that part of Lot* 2 in Sec. 36, etc., lying north and west of certain lines. Plaintiffs assumed to prove the affirmative of that issue; for, both by common law and by the statute of Indiana, they must recover *on the strength of their own title.* (§ 1057, Petition p. 5).

This issue the parties submitted to the court for trial.

THE VERDICT OR FINDING.

"In a disputed case, *a verdict is simply the answer of a* "*jury*, to the court, *on the issues of fact committed to their* "*examination.*

"A judgment is the conclusion, that flows from the "law, and the verdict of the jury."

Stennett v. Scott, 2 Eng. (7 Ark.) p. 281.

The verdict must respond to the issue joined, between the parties, to the action.

Patterson v. U. S., 2 Wheat. 221.
Garland v. Davis, 4 How. 131.
Middleton v. Quigley, 7 Halst. 352.
Holmes v. Wood, 6 Mass. 1.
Kilbourn v. Waterous, Kirby, (Conn.) 424.
Fenwick v. Logan, 1 Mo. 401.
Moody v. Keener, 7 Porter, (Ala.) 218.
Sawyer v. Fitts, 4 Stew. & Porter, 365.
Vines v. Brownrigg, 2 Dev. Law, 537.

In *Patterson v. The United States*, (2 Wheat. p. 225), this court said: "The rule of law is precise upon this "point. A verdict is bad, if it varies from the issue in a "substantial matter, or if it find only part of that which is "in issue. The reason of the rule is obvious; *it results "from the nature and the end of pleading.* Whether the jury "find a general or a special verdict, it is their duty to de- "cide the very point in issue."

The statutes of Indiana, touching verdicts, are cited in the petition (p. 6,). They are in accord with the common law, except that the form of the verdict is, in all cases, *for the plaintiff*, or *for the defendant*, unless the jury render a special verdict.

Those statutes apply to *the form*, not to *the substance* of verdicts.

Indiana Revised Statutes, Sec. 545: "The verdict of "a jury is either general or special. A general verdict, is "that by which they pronounce generally upon all or any "of the issues, either in favor of the plaintiff or defendant. "A special verdict is that by which the jury find the facts "only, leaving the judgment thereon to the court."

(This agrees with the common law. 3 Blackstone, Com. 377.)

On the effect of a verdict note: AN ISSUE *found by verdict, shall always be intented true* until set aside.

Coke on Littleton, 227, b.

Prentice v. Zane, 8 How. 470, pp. 484–6.

Parkes v. Turner, 12 How. 43–4.

THE FORMS OF VERDICTS IN EJECTMENT have been settled for more than three hundred years, *according to the fiction* such verdicts are required to perform, in the administration of justice, on such issues.

The forms of general verdict in ejectment are very simple and well understood. *Guilty. Not guilty. Guilty as to a part* of the premises described in the declaration, and *not guilty as to the residue.* (*Gilbert on Ejectment*, 246.)

The verdict being thus delivered, is written down upon the record, according to its legal effect, by the clerk of the court, thus: "They" (the jury) "say they find the de-"fendant guilty of the trespass and ejectment wherewith "he is in said declaration charged"—"The said jurors de-"clare upon their oaths that the said defendant is guilty of "the trespass and ejectment wherewith he is in said declar-"ation charged, as to the east half of the lands in said de-"claration described, but as to the residue of said lands, "they say that the defendant is not guilty." (*Gilbert on "Ejectment*, 246.)

Like forms are given in ADAMS *on Ejectment*, 489, 490, and RUNNINGTON *on Ej.* 129, 495–6.

In TYLER (*on Eject.* p. 579), we read: "According "to the forms given in Runnington's old treatise on eject-"ment, the plaintiff may take verdict for his term in certain "premises, *describing them*, and the defendant, have the "verdict as to other premises, *also describing them;* and "such is always the practice at common law, and such is "almost universally the practice in the several states."

We copy the full entry from RUNNINGTON, p. 495. "As to the 9 acres * part of the tenements specified "in the within declaration, the said jurors declare upon "their oaths, that the said John Ladd, is guilty of the tres-"pass and ejectment within written, in the 9 acres afore-"said, as the said John Norton doth within complain "against him; and they assess the damages of the said "John Norton by reason of the said trespass and ejectment "* to six pence: and as to one garden, etc., other "part of the tenements specified in the within declaration, "they declare, upon their said oaths, that the said John "Ladd, is not guilty of the within written trespass and "ejectment in the said one garden," etc.

It is to be observed that this is a solemn form, not only as to that part whereof the jury find the defendant guilty, but also as to that part whereof they find him not guilty.

It is their deliberate judgment, upon their oaths, deliberately announced, as much as to one part of the land, as to the other part of the land.

The judge below in his opinion, shown in the petition (pp. 19, 20), said: "It was competent for the court, under "the issue, to find *to what extent* the defendant was guilty, or "had held unlawful possession *of the premises* described" (in the declaration); "and if, under the evidence, it ap- "peared that a fence, had become or was the boundary of "such occupation, it was proper that the fact should be "stated."

So he claims, that the fence named as on the south line of lot 1 (petition p. 18), is not named as a boundary of the land sued for, but as a division of the land sued for into two parcels, and he necessarily claims, that as to that portion of the land sued for, lying north of that fence, no verdict was given.

No precedent can be found, of a valid verdict for part only, of the land sued for.

On the contrary, in the only case, we have been able to find, where such a verdict was rendered, it was held void. Two parcels were described in the declaration. The jury found for the plaintiff, as to one, and said nothing about the other.

Wise v. Hine, 1 Green, (Iowa,) 62.

In giving his opinion, Judge Woods, guesses at what the record intended. It was given while Judge Gresham was Postmaster General. As to the value, of the guess, it makes no difference whether he talked with Judge Gresham or not; for Judge Gresham's judgment on the legal effect of that record, is no better than that of any other man; and at the close of the term, when it was entered, it was no longer in his remembrance. (Co. Inst. 260, a). A judge who has left the bench, could hardly be called as a witness to testify to the legal effect of a record.

To make the opinion logical, we must conclude the

judge intended to add, that he would presume that as to that part of the land lying north of that fence, the finding was intended to be, not guilty, or for the defendant.

Unless there is a distinction, between a recorded verdict of a jury and a recorded finding by a judge, this cannot be. In *Prentice v. Zane*, (8 How. p. 484), this court said: "A verdict says, Coke (Co. Litt. 227, a) finding matter "uncertainly and ambiguously, is insufficient and no judg- "ment will be given thereon.

"A verdict which finds but part of the issue, and *says* "*nothing as to the rest*, is insufficient, because the jury have "not tried the whole issue. So if several pleas are joined, "and the jury find some of them well, and as to others find "a special verdict, which is imperfect, a *venire facias de* "*novo* will be granted for the whole. (2 Roll. Abr. 722, pl. "19; Auncelme v. Auncelme, Cro. Jac. 31; Woolmer v. "Caston, Cro. Jac. 113; Treswell v. Middleton, Cro. Jac. "653; Rex v. Hayes, 2 Ld. Raym, 1518)."

The same doctrine was stated in *Patterson v. U. S.* 2 Wheat. 224, and in *Garland v. Davis*, 4 How. p. 147, and is doubtless as much the law to-day, as it was in the time of the first James. The District Judge, in his opinion, would not only strike out a good verdict *for the plaintiffs*, (petition p. 18), but would stultify Judge Gresham, as to the residue, presuming that he rendered such a verdict as had been forbidden from the origin of such trials. (1 Archbold, Pr. 315; 1 Ld. Raym. 324; 2 Wheat. 221; 4 How. 131; 7 Halst. 352; 6 Mass. 1; Kirby, 424; 1 Mo. 401; 7 Port. 237; 4 Stew. & Port. 365; 2 Dev. Law. 537; 1 Green Iowa, 62.)

Looking at the entry in the light the judge would present it in his opinion, but without striking out the finding *for the plaintiffs*, we apply again the authority of Coke, which this court has so often approved: "If the jury give "a verdict of the whole issue and of more, &c., *that which*

"*is more is surplusage* and shall not stay judgment; *for* "*utile per inutile non vitiatur.*"

COKE *on Littleton*, 226, a.

Patterson v. U. S. 2 Wheat. 225.

If the function of the judge, in making his finding on an *issue* at common law submitted to him, and the function of the clerk, in entering that finding on the record, do not vary from the function of a jury, in rendering verdict, and the function of the clerk, in entering that verdict on the record, there is no doubt on the legal effect of the record under examination (Petition p. 18).

On this point the provisions of the local statutes of Indiana, are as follows, (petition p. 7):—

"§ 551. SPECIAL FINDING BY COURT. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally *for the plaintiff or defendant* unless one of the parties request it, with a view of excepting to the decision of the court, upon the questions of law involved in the trial; in which case the court shall *first* state the facts in writing, and *then* the conclusions of law upon them, and judgment shall be entered accordingly."

"§ 552. The provisions of this Code respecting trials by jury, apply, so far as they are applicable, to trials by the court."

"§ 564. When a trial by jury has been had, and a *general verdict rendered, the judgment must be in conformity to the verdict.*"

"§ 565. Where the verdict is special, or *where there has been a special finding on particular questions of fact*, the court shall render the proper judgment."

It is decided and determined by the Supreme Court of Indiana, that a finding by the court, not made at the request of either or any of the parties, is not a special finding. *Northcutt v. Buckles*, 60 Ind., 577; *Caress v. Foster*, 62 Ind. 145.

The sections quoted, show that the Indiana legislature intended to require rigid adherence to those steps which the common law had incorporated into common law trials, affording landmarks at which the rights of each party would be adjusted with certainty. They show, that, by the local law, the judge is as certainly required to find a general verdict or a special verdict, *separate* from the decision of law thereon, as though a jury made the finding; and that the judgment record, under consideration, (petition p. 18), has no quality of a special finding under the Indiana law.

But the case under consideration, was tried in a Circuit Court of the United States; and the action of the court, and its officers, are governed by the laws of the United States. Those laws are very explicit.

United States R. S. § 648. "*The trial* of issues of fact, "in the Circuit Courts, *shall be by jury*, except" in the cases named.

§ 649. "Issues of fact, in civil cases, in any Circuit "Court, *may be tried* and determined by the court, without "the intervention of a jury. * * The finding of "the court upon the facts, which may be either general or "special, *shall have the same effect as the verdict of a "jury.*"

(The effect, of the verdict of a jury, is: that it is recorded distinct from all other matters, as the decision of the issues; and it forms the basis of a judgment, which is an entirely separate matter).

§ 700. "When an issue of fact, in any civil case, in "a Circuit Court, is tried and determined by the court, with-"out the intervention of a jury, according to section 649, "the rulings of the court in the progress of the trial of the "cause, if excepted to at the time, and duly presented by a "bill of exceptions, may be reviewed by the Supreme Court, "upon a Writ of Error or upon Appeal; and when the "finding is special, the review may extend to the determin-

"ation of *the sufficiency of the facts found*, to support the "judgment."

§ 987. "When a Circuit Court *enters judgment* in a "civil action, either upon a verdict, *or on a finding of the* "*court* upon the facts, *in cases where such finding is al-* "*lowed*" etc.

These laws cannot be applied, if the whole can be thrown into hotchpot, as the judge below would claim to be proper.

Sec. 987, treats the finding of the court, upon the issue of fact, as distinct from the judgment entered thereon, as the verdict of a jury necessarily is. It speaks of cases where such a finding is allowed. Sec. 648, is mandatory that the trial of issues of fact *shall be by jury*, except in the case where they *may be tried* and determined by the court. Here is a permission,—a certain class of cases in which "such finding is allowed," Then the mandatory character is resumed: "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury" (§ 649).

This reference of section 649, to a general or special finding upon issues of fact, has reference to general and special verdicts of juries. This is apparent, by the language of the section, giving such findings the same effect; it is made more apparent by Section 700, where it is provided that when the finding is special, the review may extend to the determination of the sufficiency of the facts found, to support the judgment.

These sections revise the whole subject of the law, in relation to trials by the court, in the Circuit Courts of the United States. They leave room for no latitude.

And so it has been adjudged. Even in Louisiana, where the local methods of practice were like the methods of chancery, this court held, that *this statute is binding on the federal courts, and connot be disregarded. Insurance Co. v. Tweed*, 7 Wallace, 44 p. 51.

Norris v. Jackson, 9 Wallace, 125, p. 127, *Miller*, J.: "The first thing to be observed in the enactment * "* allowing parties to submit issues of fact in civil cases, "to be tried and determined by the court, is, that it pro- "vides for two kinds of findings, in regard to the facts, "to-wit: general and special. This is in perfect analogy to "the findings by a jury, for which the court is in such cases "substituted by consent of the parties. In other words, "the court finds *a general verdict on all the issues for "plaintiff or defendant*, or it finds a special verdict." "The next thing to be observed is, that whether the finding "be general or special, *it shall have the same effect as the "verdict of a jury.*"

Bassett v. U. S., 9 Wallace, 38, p. 40: "When the court, by permission of the parties, takes the place of the jury, its finding of facts is, * precisely, as if a jury had found them, by verdict."

If the finding on the issue presented by the pleadings is "*for the plaintiff*" or "for the defendant." it must have the same effect as a similar finding of a jury.

Coddington v. Richardson, 10 Wallace, 516.

Where the court is substituted for the jury, its verdict is conclusive by operation of the Constitution.

Phillips v. Preston, 5 How. p. 289.

Dirst v. Morris, 14 Wallace 484, p. 491: "As the "law stands, if a jury is waived, and the court chooses to "find generally for one side or the other, the losing party "has no redress on error, except for the wrongful admiss- "ion or rejection of evidence."

Ins. Co. v. Folsom, 18 Wallace, 237, p. 248: "Where "a jury is waived as therein provided, and the *issues of "fact* are submitted to the court, the finding of the court "may be either general or special, as in cases where an *issue "of fact* is tried by a jury." * *

"*Jennison v. Leonard*, 21 Wallace, 302, p. 307: "There is but a single question of law in the case, viz: Are

"the facts found, sufficient to support the judgment? * "* We are authorized by the statute * where "the finding of facts is special, to review the determination "of the sufficiency of the facts found to support the judg- "ment (Norris v. Jackson, 9 Wal. 125,) and we are au- "thorized to examine no other question."

When the jury is waived, and the trial of the issue is submitted to the court, the finding or verdict of the judge upon the issue, takes the place of the verdict of the jury. The trial is still a trial at common law. "*The sufficiency "of the verdict, in its form, as well as the question of its "force and effect*, must depend upon the rules of the com- "mon law, and the statutes of the United States." If it constitutes a legal verdict, a court of error will give effect to the verdict according to the rules of common law, and it is "entitled to the conclusive effect which the common law gives it." *Parks v. Turner*, 12 How. 43-44. The reason of this case is applicable in principle.

The function and duty of the judge in making and delivering his finding, on an issue of fact submitted to him in an action at common law, is the same as the function and duty of a jury, in a like case, where a jury is not waived. *The town of Martinton v. Fairbank*, opinion by *Mr. Justice* Woods, No. 866, of Oct. Term, 1884, of this court. It follows, as a necessary consequence, that, the duty of the clerk, in recording the finding, is the same as in recording the verdict; and the effect of the recorded finding, is the same as the effect of the recorded verdict.

It would seem that the absence of a written stipulation would not affect the jurisdiction, of the court, to try the case in lieu of a jury. (Phillip's Practice, 51, 153).

Lawful authority to act, in lieu of the jury, must be presumed, when it appears that the jury was waived, and the issues were tried by the court, and a finding thereon was announced. Grignons, Lessee, v. Astor, 2 How. 319; Tilton v. Cofield, 93 U. S. 165.

The province of the judge in the trial of an issus made by the pleadings, is, to try that issue by the evidence and render a verdict. (Prentic v. Zane, 8 How. p. 486).

This court announced, in 1855, that, "parties may, by "consent, waive the trial of issues of fact by a jury, and "submit the trial of both facts and law to the court." It will not be a "mistrial." But if error appears, on the face of the record, the judgment entered will be reversed. (Guild v. Frontin, 18 How. 135).

If the trial, in the case before us, had been by a jury, it does not seem possible, that a man could be found, who would attempt to confound the record of the verdict, with the judgment.

The issue was: whether plaintiffs were owners in fee simple, and entitled to the possession, of that part of lot 2 lying west of the Lake Shore Railroad, and north of a line parallel with, and 753 feet south of the north line of said lot. Defendant denied it.

The verdict or finding as rendered is: "And the court, having heard the evidence, and being fully advised, *finds for the plaintiffs.*"

If that is not a good finding, for the plaintiffs, a verdict in the same words would be bad, and would not decide the issue. It is in the words of the Indiana Statute, (§§ 545, 551, Petition p. 7). It is in the exact words of verdicts held good by this court, in many cases.

The next word following this verdict in the record is *and*. It signifies that the court did something else after having made a finding for the plaintiffs, upon the issue of fact submitted to him, which was entered of record, where it should have the same effect as the verdict of a jury. (U. S. R. S. § 649). "The court having heard the evidence, and being fully advised, finds for the plaintiffs, *and orders* and *adjudges*, that they shall have and recover of the defendant. Who ever heard of those two words, *orders and adjudges*, in a verdict?

In the old form, the equivalent would have been: the court having heard the evidence *finds* the defendant *guilty* of the trespass and ejectment, which the plaintiffs in their aforesaid declaration thereof have complained against him; *and Orders and adjudges.* etc.

In the Indiana form, it is equivalent to the more formal record: "And the court having heard the evidence, and "being fully advised, doth find the issues for the plaintiffs, "that they, said plaintiffs are the owners in fee simple and "entitled to the possession of all the lands in their com- "plaint described, that the defendant, Frederick Eggers, at "the District aforesaid, holds possession of the said de- "scribed real estate, without right, and for more than a "year past, has unlawfully kept the plaintiffs out of pos- "session of the same." *And* (thereupon the court) *Orders* and *Adjudges* that the plaintiffs do have and recover. etc.

Upon this record, it is immaterial whether the possession by the defendant, of the land described in the declaration was proved by evidence, was admitted by the defendant in open court or was considered as admitted by reason of the statute of Indiana (§ 1056).

The answer was under Sec. 1055 and contained "a denial of each material statement or allegation of the complaint." The verdict or finding upon each averment of the complaint was under section 551 "for the plaintiff" and against the defendant. *It necessarily found that each averment of the declaration was true.*

Parks v. Turner, 12 Howard, 39, p. 44.

Roach v. Hulings, 16 Peters, p. 321.

THE JUDGMENT.

"*After verdict*, the successful party is, *of course*, en- "titled to the judgment of the court."

RUNNINGTON *on Ejectment*, 393.

"The court must enter a judgment on the verdict, or

set it aside, and grant a new trial." (*Mitchel v. Geisendorff*, 44 Ind. p. 360). The judgment of the court must "accord with, and rest upon the verdict." (*Bowles v. Stout*, 60 Ind. 271.)

Judgment should conform to the verdict.

Marmaduke v. Tennant, 4 B. Mon. (Ky.) 210. p. 214.

In ejectment, upon a verdict for the whole, a judgment cannot be entered for a part.

Obert v. Hammel, 18 N. J. L (3 Har.) 73.

"The judgment is the sentence of the law, upon the matter, contained in the record."

3 Blackstone, Com. 395.

Runnington on Ejectment, 402: "Where there is a ver-"dict, the judgment may be considered, either, where it is "for the whole or for part only, of the premises demanded "by the action."

Page 404: If the plaintiff obtain a verdict for the whole, *the entry of the judgment is*, that the plaintiff recover his term in the whole, * * (405) if the plaintiff has a verdict only for 'part,' *the judgment is* that he recover that part, and that as to the other part, whereof the jury acquitted the defendant, the judgment is that the defendant go thereof without day.

Tyler on Ejectment, p. 584. "If the verdict, in the "action of Ejectment, is in favor of the plaintiff, for the "premises in the declaration described, in general terms; "*the entry of Judgment is*, that the plaintiff recover his "term against the defendant, of and in the premises afore-"said. (Doe v. Wilson, 2 Starkie, R. 477; Simpson's "Heirs v. Shannon's heirs, 5 Litt. 322; Farrow v. Farrow, "2 J. J. Marsh. 388). But when the verdict is in favor "of the plaintiff, for a part only of the premises claimed "in the declaration, and in favor of the defendant, for the "residue, *the judgment is*: that the plaintiff recover pos-"session of the part found for him by the verdict; and as

"to the other part, that the defendants go thereof without day."

(See also *Gilbert* on Ej. p. 303).

These are the forms given in all the books. They are definite, concise, explicit. Any one can see with certainty who the judgment is for, and who the judgment is against.

It is in support of the most sacred rights of property and the highest functions of the law that we insist, that those forms and methods shall be observed, which assure definiteness, conciseness, clearness, certainty, that assure to every citizen the power to understand the judgment.

Understanding the necessary substance of verdicts in actions of ejectment, and the necessary form of judgment thereon the legislature of Indiana enacted: "the court "rendering the judgment, on application made within one "year thereafter, by the party *against whom judgment is* "*rendered*, * * * shall vacate the judgment "and grant a new trial." (§ 1064). Adherence to the forms and methods of proceeding which the legislature had in mind, is essential to preserve, substantially and certainly, the right it intended to confer.

So we have examined the steps.

The *issue*, the matter to be tried, is determined by the parties.

The *verdict* or *finding* is confined to the very point in issue. The tribunal has no jurisdiction to adjudge any matter outside of that.

The parties, who make up the issue, have the right to have it tried and determined, by a jury of twelve men. If both parties agree, they may waive a jury, and substitute the judge in place of the jury, to try the issue, and render a verdict just as the jury might do. The law determines

what the submission is. The law prescribes the duties of the judge, and the duties of the clerk of the court. *The contract of submission is, that the judge shall render a verdict precisely as a jury would do.* The law commands that the finding of the judge, announced by him, shall be recorded by the clerk, and shall have the same effect that the verdict of a jury in like manner announced, by it and recorded by the clerk of the court, would have. The law requires the court to order judgment, or to set aside the verdict, and grant a new trial. This may be done at once, as soon as the verdict is delivered. But if the court orders that judgment be entered, *the law prescribes the substance of the judgment*, and *the Clerk* is by law required to write out that substance.

The Court upon the bench commands: "Let judgment be entered." *The Clerk* makes a minute of it, and after the court has gone, he writes it out upon the record. He cannot be directed by the judge, but by *the issue* and the *verdict* thereon, which have preceeded, upon the same record. If the clerk enteres the judgment accordingly, it is well. If he fails to pursue the issue and the verdict, the law commands that it be amended. (U. S. R. S. § 954).

Where the parties have submitted the issue to the court for trial, it will not be a mistrial, but if error appears on the face of the record, the judgment entered will be reversed. (*Guild v. Frontin*, 18 How. p. 135).

This court said in *Suydam v. Williamson*, 20 How. p. 433: "The operation of the Writ of Error, addresses "itself to the record, as an entirety, and not to any separate "portion of it, as distinct from the residue; and when the "cause is removed into the Appellate Court, any error ap- "parent in any part of the record, is within the revisory "power of such tribunal. The rule is: that whenever the "error is apparent on the record, it is open to revision, "whether it be made to appear by bill of exceptions, or in "any other manner. Bennett v. Butterworth, 11 How.

"669; Slacum v. Pumery, 6 Cranch. 221; Garland v. "Davis, 4 How. 131; Cohens v. Virginia, 6 Wheat. 410."

In *Zeller v. Eckert*, 4 How. 297-8; the function of bills of exceptions had been distinctly defined, thus: "So "far as error is founded upon the bill of exceptions, in- "corporated into the record, it lies only to exceptions taken "*at the trial*, to the ruling of the law, by the judge, and "to the admission or rejection of evidence. (1 Bac. Abs. "779; Bull. N. P. 316). *Beyond this, we have no power* "*to look into the bill, on a writ of error, as it is the crea-* "*ture of statute, and restricted to the points stated.* (13 "Edw. 1 Ch. 31)."

Hence, as the faults, in the record before us, occurred after the trial, and after the finding for the plaintiffs had been announced and recorded, they are apparent on the face of the record, and no part could be played by bill of exceptions. This record is perfect and impregnable till the end and result of the trial was reached. No exception was taken. The finding is exactly responsive to the issue. No exception could be taken to any subsequent step by bill of exceptions, because as stated above: "it is the creature of statute and restricted to the points stated."

It is apparent, on the face of the record, that the judgment entered up after that, is not confined to the point in issue, and embraces matter about which no evidence could be received. If this was the act of the court, it was error, to be redressed by writ of error; if it was the fault of the clerk, it is to be amended; and mandamus to compel the amendment, is the remedy.

If dictating the contents of the entry of judgment, is the duty and function of the judge at common law; if what is written down as *the judgment* is to be written in words dictated by the judge, the judge erred in requiring these words to be written; but if it is the duty of the clerk to write out the judgment of the law, if it is his function and duty to furnish the words, then, the words are in all

cases considered his, whether the judge helps him write his record or not; and the faults noted are *misprisions* to be amended, not errors to be reviewed on writ of error.

We quote below, a great array of authority, showing the function clerical; and that if that which is written down, is not the judgment of the law on the issue, and confined to the issue, it is a misprision to be amended. We wish to add one leading case, as showing how far the doctrine is carried. In *Usher v. Dansey*. 4 Maule & Selwyn, 94, pp. 97–100, a verdict had been rendered for a sum in excess of that demanded in the declaration, and judgment entered for that sum. But by the King's Bench, it was held *vitium clerici*; and the judgment was amended by the declaration; because it was the duty of the clerk to pursue the issue in entering the judgment, which is the legal sequence of the issue.

The following authorities are referred to on the subject of

AMENDMENT.

GILBERT *on Ejectment* (p. 92). "As the verdict is "the ground of the judgment, it ought not to be entered "for more land, or different parcels, than the defendant "was found guilty of by the verdict. But a variance between "the verdict and judgment, occasioned by the misprision "or default of the clerk in entering the judgment, *is not* "*fatal*, but hath been amended by the court, after Writ of "Error brought * because it appeared to be the misprision "of the clerk, *who had not pursued the verdict, which* "*ought to have been his guide in making up the judgment*, "and no mistake in point of law, in giving the judgment; "therefore the party ought not to suffer for his mispri- "sion."

Page 114. "Where judgment is given on verdict, "there the verdict is the foot and ground of the judg- "ment."

RUNNINGTON *on Ejectment*, page 401. "The verdict

"being the ground of the judgment, the judgment ought "not to be entered for more land, *or for different parcels*, "than the defendant was found guilty of by the verdict, "yet a variance between the verdict and judgment, occa- "sioned by the misprision or default of the clerk in entering "the judgment, *is not fatal*, but may be amended by the "court, even after a writ of error brought" * "because "the variance arose from misprision of the clerk, who had "not pursued the verdict, which ought to have been his "guide, in making up the judgment."

ADAMS *on Ejectment*, (page 328) States the same doctrine.

TYLER *on Ejectment*, concurs. p. 582.

In the cases below cited from Viner's Abridgment and Bacon's Abridgment, the *judgments* were in action of *Ejectment* for damages and costs only, and no judgments for possession of the land, yet the court *reformed* them, by amendment *nunc pro tunc*, completing them as judgments for possession, and they were affirmed.

VINER'S *Abridgment* (2 Vol. 310) title *Amendment* (F) 8. "In an ejectio firmæ of land, if, upon not guilty "pleaded, a verdict is found *for the plaintiff*, and costs "and damages given per curiam, and thereupon judgment "is given: Quod querens recuperet the damages and costs, "and *not* quod recuperet *terminum* as the use is; this is "the fault of the clerk, this being the usual judgment in "this action, and therefore it shall be amended." This "was done upon a motion after a writ of error brought in "Belch v. Pate, 15 Car."

So in the same place (2 *Viner Abr.* 310) several cases are cited where the judgment was entered for a larger number of acres than had been recovered by the verdict, and it was amended by the verdict.

BAC. ABR. title *Amendment and Jeofails* (F). "In "Ejectment, if the judgment is entered quod quærens re-

"cuperte the damages and costs, and not quod recuperet "terminum as the case is, *this shall be amended.*"

These authorities are constantly applied in such cases as this at bar: Witness the following cases—

Fite v. Doe, 1 Blackford, 127. Ejectment. *Blackford, J.*; p. 132. "The second error assigned is, that "judgment is only rendered for damages and costs, instead "of being in the usual form, *quod querens recuperet terminum*" (that therefore he recover his term, &c.) "Such an omission is nothing more than a misprision of "the clerk, and might be amended, 2 Vin., 310; 1 Bac., "Abs. 165." It was considered as amended.

Smith v. Myers, 5 Blackford, 223. Action on a penal bond, default, and proof of $250 damages and judgment for plaintiff. By neglect or mistake of the clerk final judgment was only rendered for costs.

"*Blackford*, J.: (p. 224.) The omission to enter the "formal judgment for the penalty is only a misprision of "the clerk. Such a misprision may be amended on notice "and motion, at any time. It has been held that where "the judgment in ejectment is entered, *that the plaintiff recover his damages and costs*, instead of *that* "*he recover his term*, the judgment may be amended, "though this is but an action of trespass in its own nature. "1 Bac. Abr. 165. There seems to be as little reason to "object to the amendment in the case before us, as to that "in the case referred to."

McManus v. Richardson, 8 Blackford, 100. *Blackford* J.: "In ejectment, if the judgment be entered 'that "the plaintiff recover the damages and costs,' omitting that "he recover his term, it may be amended even after error "brought. 2 Viner Abr. 310; Fite v. Doe, 1 Blackford, "127. So, where judgment is entered against an adminis- "trator de bonis propriis, when it should be against the "goods of the intestate, it may be amended after error "brought: Short v. Coffin, 5 Burr. 2730; King v. Anthony,

"2 Blackf. 131," therefore a justice's judgment was reformed by amendment.

Indiana reports are full of such amendments, *nunc pro tunc.*

Jenkins v. Long, 23 Ind. 460.
Bales v. Brown, 57 Ind. 282.
Latta v. Griffith, 57 Ind. 329.
Burson v. Blair, 12 Ind. 371.
Silver v. Butterfield, 2 Ind. 24.
Fite v. Doe, 1 Blackford, 127.
Smith v. Myers, 5 Blackford, 223.
McManus v. Richardson, 8 Id. 100.

In *Usher v. Dansey*, 4 Maule & Selwyn, 94, (above cited) entry of judgment for the full amount of a verdict, which was in excess of the sum demanded in the declaration, was held the fault of the clerk and amended.

In *Rees v. Morgan*, (3 Durnford & East, 349,) Where the defendant in *replevin* made cognizance of rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, namely 19*5l*; the verdict endorsed on the pannel was: "verdict for the defendant, damages, 19*5l*;" and judgment was thereon entered against the plaintiffs for that amount, and for costs.

After writ of error brought by the plaintiff, and in the Court of Error, to which the whole record had been sent, the defendant moved that the judgment "be amended by altering it to a judgment *pro retorno habendo.*" (See Maryatt's motion, p. 349.) And the judgment was so altered. (See Syllabus by the reporter.) Chambre, etc., opposed the motion; showing that the judgment could not be supported as it was; and arguing (p. 350): "Neither can it be *altered* to a judgment pro retorno "habendo at common law." * "He can not *now* "*enter up a common law judgment* under pretense of "amending a mistake of the clerk. Under the statutes of "jeofails, all errors in the process, and even the mistakes of

"the clerk in entering up judgments, may be amended; "but this can not be considered a mistake of the clerk, for "it is an attempt to enter up an entirely new judgment." " * * "The utmost therefore that can be done is "to alter a judgment when the clerk (strictly speaking) "has made a mistake, but not to alter an erroneous judg- "ment, when there is no misprision of the clerk. The "Statute 8 Hen. 6, C. 12, S. 2., which enables the court to "amend in affirmance of the judgment given, does not em- "power them to enter up a different judgment.

"*Lord Kenyon*, C. J. *The amendment prayed for is "an inevitable consequence of the finding of the jury.* On "the premises, which the jury have found, no other judg- "ment than that at common law could be entered. I think "the case in Burrow goes the full length of deciding the "present."

So by the whole court the judgment was amended nunc pro tunc and affirmed.

The case in Burrow, referred to, is *Short v. Coffin*, 5 Burr. 2730: "The court, after taking two or three days to "consider of it, were all clearly of opinion to amend a judg- "ment against an executor, de bonis propriis, *by making it* "de bonis testatoris si, &c.; et de bonis propriis si non, &c.

"Mr. Davenport had moved for this amendment, upon "the foot of its being only a mistake of the clerk," and cited numerous cases.

"Mr. Wallace, who opposed the amendment, denied it "to be a mistake of the clerk. He said it was a mistake "in law, and this amendment would alter the essential "judgment." (Citing authorities in point.)

"*But* LORD MANSFIELD *delivered it as the opinion of "the court: that this is not an error in the judgment of "the court in point of law; but a mere mistake of the "clerk.*"

These cases are specially quoted because the statute of the United States (§ 649), provides that the finding of the

judge shall have the same effect as the verdict of a jury. The verdict of the jury in *Rees v. Morgan*, was extremely informal—"*for the defendant*;" yet the whole King's Bench determined that "*the amendment prayed for is the inevitable consequence of the verdict of the jury.*" The cases arose under the statute of which our section 954, *United States*, R. S., is a complete re-enactment, viz: Statute 8, Hen. VI, c. 12, § 1. "For error assigned or to "be assigned in any record. * * * No judg-"ment nor record shall be reversed nor annulled.

"§ 2. And the judges of the courts and places in "which any record * for the time shall be, shall have "power to examine such records * and to *reform* "and amend (in affirmance of the judgments of such re-"cords and processes) all that which to them in their dis-"cretion seemeth to be misprision of the clerks in such "record."

The words in parenthesis are contained in parenthesis in the original. It is apparent that their omission has no effect in the version of the same general law found in our Statute, Sec. 954. "No * judgment * shall be *reversed for any defect.* * But the court shall amend *every such defect.*" This necessarily is in affirmance of the judgment. No words in the section limit the power to the misprision of the clerk.

This court has so reformed the entry of a judgment, nunc pro tunc.

At the January term, 1829, of this court (Feb. 14, 1829), in the case of *The Bank of Kentucky v. Wister*, (2 Peters, 318), the opinion concluded with the words: "the judgment is affirmed with costs;" and the judgment order is so found upon page 326 of that report.

At the January term, 1830, motion was made "to "amend the judgment rendered in this cause, at the Jan-"uary term, 1829, by giving to the defendants in error, "damages on the judgment, at the rate of six per cent. per

"annum, and that the judgment of the court be so re-
"formed."

Marshall, C. J. "The court directs the amendment "to be made, and the judgment of the court to be reformed; "allowing interest at the rate of six per cent. The reason "is, that by a rule of this court, when there are no special "circumstances, six per cent. is allowed upon the amount "of the judgment in the court below; under special cir-"cumstances damages to the amount of ten per cent. are "awarded by the court. The omission is deemed by this "court a mere clerical error." The judgment of Feb. 14, 1829, was reformed by the amendment so that the judgment read thus: "It is adjudged and ordered by "this court, that the judgment of the said Circuit Court "in this case be and the same is hereby affirmed with "costs *and damages at the rate of six per cent. per* "*annum.*"

Bank of Kentucky v. Wister, 3 Peters, 431.

Such has been the uniform law from the collation of the authorities in *Mason v. Fox*, Cro. Jac. 632. (Which was an action of ejectment, in which the judgment was amended and reformed to conform to the verdict).

The judgment we are examining is a final judgment on which a writ of error will lie; and it only wants to be amended. (*Runnington on Eject.* 401; *Gilbert* on Eject. 92; *Woodward v. Brown*, 13 Peters 1; *Stockton v. Bishop*, 4 How. 155, p. 168; *Miller v. Royce*, 60 Ind. 189; *The State v. Cross*, 6 Ind. 387).

In *Miller v. Royce, Administrator* (60 Ind. 189), it was held that a judgment entered Sept. 10, 1864, should in 1877 (thirteen years after the entry,) be *reformed*, amended and corrected as prayed for in the motion (p. 191): "by inserting therein *as of the date thereof*, the amount": $1,333.35. The subject of the Statute of Amendments and Jeofails was carefully discussed, and the conclusion, that the judgment should be so amended and reformed *as of the date thereof*, was stated at the conclusion of the opinion.

In *The State v. Cross*, (6 Ind. 387) it was objected that there was *no judgment for the debt*; but held that as there was a judgment, and the record showed what the judgment ought to be, the judgment must be reformed by the Supreme Court, or considered as amended.

In *Sherman v. Nixon*, 37 Ind. 154, a judgment for $105.83, was *reformed* and made into a judgment of $505.83, *nunc pro tunc* as of the date of the judgment.

THE RECORD BELOW.

The Judge of the District Court, says, in effect, of the record below, that he is clear, that justice was not administered in the case, in the ordinary form. This court says: "we are bound to presume that justice was administered in the ordinary form." (*Stockton v. Bishop*, 4 How. 167). This was the ground of decision upon one of the most imperfect of records. We wish to quote from the case, as it shows, how clearly the issue, and the finding designate what the judgment must be.

Stockton v. Bishop, 4 How. 155, p. 167. *Catron, J.*

"Who the jurors were, or how many found the verdict, "does not appear; nor does it appear that they were sworn "to try the issue, further than the jury say in their verdict. "Still *we are bound to presume* in favor of proceedings in "a court having jurisdiction of the parties and subject-"matter, *that justice was administered in the ordinary* "*form*, when so much appears as is found in this imperfect "record. *The declaration, plea and finding* must be "taken together; and *from these*, we are bound, by the "32d section above cited" (R. S. § 954, Jeofails) "to as-"certain whether, according to the right of the cause and "matter in law, the plaintiff is entitled to her damages."

Page 168. "According to the right of the cause and "matter of law appearing to us *on the pleadings and ver-*"*dict*, we think the plaintiff is entitled to her damages, and

"the judgment below ought to have been rendered for her.

"But the judgment, there given, is also assailed, and "justly, as being less formal than what precedes it. *It is* "*either no judgment or binding.* If it amounts to nothing, "then, by the 22d section of the judiciary act, no writ of "error lay, and the case must be dismissed for want of "jurisdiction, and the plaintiffs in error be sent to the court "below to quash the execution. We think, however, there "was a judgment on the verdict, that warranted an execu- "tion for the damages found; and consequently the pros- "ecution of a writ of error. And this being so for the "reasons above stated, such judgment must be affirmed."

How is justice administered in the ordinary form, that is to be presumed, according to this decision?

The functions of a jury are distinctly defined. So also are the functions of the judge, when an issue of fact is submitted to him, under the statute. (And the judgment is conclusive evidence that this case was submitted in full compliance with the statute, 4 How. 167; *Grignon's, Lessee v. Astor*, 2 Howard, 319).

When the jury, or the court, renders a verdict, it is entered upon the record by the clerk. The court either sets aside the verdict, or orders judgment to be entered. If the judge leaves the bench, and goes to help the clerk write up the judgment, it is still the act of the clerk.

If it is the act of the clerk in one case, it is his in all cases. The effect of the record of judgment can not be *varied*, by parol evidence of a fact entirely extrinsic, and known only to the writers. The effect can not be rendered doubtful by defective memory, or conflicting evidence as to how much of the language was the dictation of the judge, and how much was supplied by the clerk. It would take the judge from the bench, and the clerk from his desk, and put them on the witness stand, in every such case, and there would be no court to pass upon their credibility, unless the trial be by jury as above shown to be requisite.

The record made by the clerk of the court below, certainly was: "And the court having heard the evidence, and being fully advised, finds for the plaintiffs." There was a declaration and plea; and this finding thereon seems to be the ordinary form of a finding in Indiana, upon the whole issue, so made. Under the next decision of this Court, which we will quote, *this was a distinct affirmation that each and every averment of the declaration, put in issue by the plea, was found to be true*, as completely as though the averments were restated in the finding:—

Roach v. Hulings, 16 Peters, 319, p. 321, *Daniels, J.*

"The point raised and pressed by counsel is: that the "jury, in rendering their verdict, failed to respond separ- "ately to the distinct issues they were sworn to try; and "that this failure by the jury, constitutes an error for which "the judgment of the Circuit Court should be arrested * " * The three issues were joined, upon affirmative "allegations, by the defendant: 1st, that the intestate had "performed his covenant; 2d, that he had paid whatever "was due the plaintiff; and 3d, that the defendant possess- "ed, in right of his intestate, a claim against the plaintiff "greater in amount than the plaintiff's demand against him. "Upon these affirmative averments, the jury find a verdict "*for the plaintiff*. Admitting that this verdict is not "technically responsive to the several pleas, it virtually an- "swers and negatives them all; for if all or either of the "pleas had been true, the verdict was untrue."

So it is established, that it is to be presumed that justice was administered in the ordinary form, even in the Circuit Court of the United States, for the District of Indiana:— that the judge performed *his* function, and *the clerk* performed *his;* that *the judge announced his finding, and the clerk recorded it*; that the judge ordered judgment, in the same manner, as judges have been accustomed to do for several hundred years, (*Mason v. Fox*, Cro. Jac. 632); and when the clerk wrote out the judgment, he made such

mistakes and misprisions, as made the statute of Jeofails necessary, as early as 14 Edw. 3, (A. D. 1341); such as were customary in 1622, at the time the instance in *Mason v. Fox*, (Cro. Jac. 632) came up, and was corrected, and have been customary ever since.

The record, under consideration, is not as meager as that reviewed in Stockton v. Bishop, *supra*.

It is sometimes said: that a written instrument must have the same effect however punctuated. It certainly ought to be the rule, that a record ought not to be impeached because not punctuated, or because the capitals are omitted from the copy sent up. But let us run the entry below together, and read it thus:

"come the parties by counsel and by agreement this cause is submitted to the court for trial and the court having heard the evidence and being fully advised finds for the plaintiffs and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot number one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line said fence running from the state line easterly to lake michigan and assesses the damages at $1 and costs taxed at $— which the said plaintiffs shall recover of said defendant all of which is finally ordered adjudged and decreed."

That is as bad as it could be written. Yet when we remember, what has gone before on the Roll: the *declaration* and *plea*, making the *issue*; and remember the proper duty and function of the judge, and the proper duty and function of the clerk, the sense is the same as if the record was carefully enrolled as shown below—(and *non constat* but it is so enrolled at Indianapolis. I certainly have never seen the record itself).—

COME THE PARTIES by counsel.

AND, BY AGREEMENT, this cause is *submitted to the court, for trial.*

AND THE COURT, having heard the evidence, and being fully advised, FINDS FOR THE PLAINTIFFS.

AND ORDERS AND ADJUDGES, THAT THEY, are entitled to, and SHALL HAVE AND RECOVER OF THE DEFENDANT the possession of so much of said lot two (2) as lies south of the south line of lot number one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line. Said fence running from the State line easterly to Lake Michigan, and assesses the damages at $1, and costs taxed at $—which the said plaintiffs shall recover of said defendant. All of which is finally ordered, adjudged and decreed.

Had the clerk, in the beginning of the last paragraph, inserted the understood words, so that the paragraph had begun, "and the court orders and adjudges that the plaintiffs shall have and recover of the defendant" it would have added nothing.

These words "*orders and adjudges*" are used interchangeably with, "*it is considered by the court*" in the precedents of entrys of judgment in Ejectment. (GILBERT *on Ej.* 298, 307). Had the clerk used the words "and it is considered by the court, that the plaintiffs have and recover," it would not have changed the sense or effect, in the view of the common law.

Gilbert gives the precedent on p. 298: "Therefore it is considered (*or adjudged,*) that the said Charles do recover" etc.

On page 307, he gives it thus: "It is considered (*or adjudged,*) that the said R. do recover against the said L." etc.

Thus we have traced the trial of Actions at Common Law as described by the Constitution and Statutes of the United States. In, *Graham v. Bayne*, 18 How. p. 62, this court said, that if the parties to a suit, chose to make the judge an arbitrator, they could not constitute this court appellate arbitrators. The statute, allowing submission to the court and substitution of the court for a jury, and finding by the court in lieu of verdict of a jury, has not made the judge an arbitrator, nor has it changed the functions of the judge and clerk in any manner, except as specificially named in the section. It is the duty of the judge to announce a finding on the issue which shall have the effect of the verdict of a jury. And when that is in fact done and entered of record by the clerk, it is as conclusive on all subsequent matter, and must have the same effect, as a verdict of a jury in the same words.

[Upon the location of the boundary of the lot 1, named in the judgment order, *note:* that if that was in issue, plaintiffs would prove it, by evidence of which, this court would take judicial cognizance, namely: "the State Line Monument" erected by the United States, under a public statute, under the particular direction of the Secretary of the Treasury, and superintendence of the Surveyor General, who located it, 634 feet north of that line, as appears by the records and by the inscription on it, a monument of stone, ten feet square at the base, and twenty feet high.]

The common law respects the rights, of both parties, and will not permit a man, brought from his home to try one issue, to be bound by evidence presented on another. Certainty, in the issue, and honesty, in the trial, is required. Each party must state the facts of his case, if his case is affirmative, and confess and avoid, traverse or deny, the facts averred by the other side, if his case is negative. He must do this on the record. And issues, so made up,

on the record, are the only ones which can be tried by courts of record. If the evidence presented, misleads the jury, so that having considered among themselves, their "verdict materially differs from the pleadings and issue thereon," judgment must be arrested. If the trial court refuses, a court of error will compel it. "If the case, laid "in the declaration, is not sufficient, in point of law, to "found an action upon," no matter, how good a cause of action, may have been shown by the evidence, nor how well, the parties may have understood it, "judgment shall be arrested and never entered for the plaintiff."

3 BLACKSTONE, *Com.* 393.

And this is well; for one well meaning or corrupt judge could, under color of administering general equity, do more harm, than a dozen others could do good, under any latitude on the issue; and a record would not determine what had been tried.

BLACKSTONE says (3 Com. 395): "Judgments are the sentence of the law, pronounced, by the court, *upon the matter contained in the record.*"

Page 396. "The judgment, though pronounced or *awarded by the judges*, is not their determination or sentence but the determination and sentence of *the law.*"

Our claim, based upon the record and the common law, is technical. Our technical knowledge is our defence. We are compelled, at our peril, to know what the issue is; what is to be tried; and to prepare for it. No matter how many just claims, or just defences, we may have—no matter how much talk and bickering we may have had with our adversary, that avails nothing, if not part of the issue. When a party has gone two hundred miles or five hundred miles to the place of trial, with his evidence and witnesses, and has entered upon the trial, if then the judge says to that party: "You have not come all this distance, without knowing that there would be evidence about boundary, and I will not permit you to escape the effect of the evidence,"

—we think of Macauley's description of Lord Jeffries, and are thankful that the technical rules of common law can protect a party, in the midst of his trial, two hundred miles from any witness on that point.

Our recollection is, that no such announcement was made during *this* trial, nor when the verdict was pronounced for the plaintiff; our recollection is, that the evidence of the location of the boundary line was, as we supposed, of an immaterial character, which we did not care to preserve by bill of exceptions, when the verdict was for the plaintiff. Our recollection is, that January 20, 1883, after the verdict was delivered, *for the plaintiff*, and entered by the clerk, some discussion arose as to the form in which the clerk ought to enter judgment on that verdict; which was adjourned to a later day; and that the undersigned went to Indianapolis in March, and made an argument on that point; which was taken under advisement and was not decided until June, the day Judge Gresham left the bench to assume the office of Postmaster General.

We do not find any statute, of the United States, prescribing the time when any judgment shall be entered of record. *Blackstone* says, (3 Com. 395): "If judgment "is not by some of these means, arrested within the first "four days of the next term, after the trial, it is then to be "entered, on the roll or record." Our recollection is; that judgment was ordered when the verdict was given; but we believe it was not written out by the clerk upon the record, till in June, 1883. Living at a long distance, we did not see it or know its contents till March, 1884.

What we say, of recollection, can have no effect upon this case; except as it illustrates the law, on which ulitimately we must rely, both as our protection and our advocate.

Whether petitioners, or their counsel, knew of the intent to write out the record in the way it is, or not; whether they felt they were subjected to outrage at the trial, or sub-

sequent arguments, or not, does not appear by the record.

That petitioners are *aggrieved*, by the judgment record, is apparent. They were not called to trial upon anything, but *their right to the land in the declaration described*. They were called to try no issue upon the boundary of lot one. The verdict or finding, for the plaintiffs, was responsive to the issue, they were called to try; the judgment decides a boundary, not in issue; and comprises land, not in the declaration.

But for the statute of Jeofails, a Writ of Error, would set that judgment right. (3 BLACKSTONE, *Com.* 407). But now under the statutes of Jeofails (*United States R. S.* Sec. 954), it is commanded, that the court in which the record may be, *shall amend every such defect*. Hence petitioners rely upon the justice of the law; which is a law as well for the Judges of the Circuit Court as for them; and they urge their prayer for *Mandamus*.

Edward Roby,
Counsel for Petitioners.

114-174

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IN THE

United States Supreme Court

OCTOBER TERM, A. D. 1884.

EX-PARTE.

DAYTON S. MORGAN }
E. ASHLEY SMITH, } *Mandamus.*

BAR ASSOCIATION

Argument resisting the issuing of an alternate writ of mandamus, asked by Morgan and Smith in their petition.

A. L. OSBORN,
A. C. HARRIS,
W. H. CALKINS,
For Respondents.

Hasselman-Journal Co. Print, Indianapolis.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1884.

EX-PARTE.

DAYTON S. MORGAN
—AND—
E. ASHLEY SMITH.

Mandamus.

ARGUMENT RESISTING THE ISSUING OF AN ALTERNATE WRIT OF MANDAMUS, ASKED BY MORGAN AND SMITH IN THEIR PETITION.

MAY IT PLEASE YOUR HONORS:

A concise statement of the facts appearing in the record and petition now before you, will render the questions raised more easily understood and apprehended.

FACTS AS STATED.

On the 26th day of July, A. D. 1882, Dayton S. Morgan and E. Ashley Smith filed in the Circuit Court of the United States for the District of Indiana, a declaration in ejectment against Frederick Eggers. Plaintiffs are citizens of the State of New York, and the defendant is a citizen of the State of Indiana.

The land sought to be recovered is described as "that part of lot two (2) in section thirty-six (36), township thirty-eight (38), north range ten (10), west of the second principal meridian, which lies west of the track of the Lake Shore & Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2), and seven hundred and fifty-three (753) feet south therefrom."

The defendant, Eggers, after being properly summoned, entered his appearance to the action, and on the 10th day of August, 1882, being the May Term of the Circuit Court of the United States, filed his motion praying a rule against the plaintiffs to make profert of their chain of title (called in Indiana Practice, "a motion to furnish an abstract of title,") and on the 31st day of August, 1882, at said term of court, the abstract of title to the lands in controversy, so far as affected plaintiffs' claim, was filed; and the defendant made answer by a general traverse, (called in the Indiana practice "a general denial,") which put the plaintiffs to the proof of every material allegation in their declaration, and confined them to the chain of title exhibited in their abstract.

The cause being at issue, the intervention of a jury was waived by written consent filed, and the issues of fact were submitted to the Court for trial.

After hearing the evidence and arguments of counsel, the Court announced his finding and judgment, which resulted in the following entry being made by the Clerk of the court in the cause, namely:

JUDGMENT ENTRY.

And the Court, having heard the evidence and being fully advised, finds for the plaintiffs and orders and adjudges that said plaintiffs are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot number one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, and assesses the damages at $1 and costs taxed at $——, which the plaintiffs shall recover of defendant. All of which is finally ordered adjudged and decreed.

This judgment was entered on the 20th day of January, 1883, by the Honorable Walter Q. Gresham, Judge of District Court for the District of Indiana, sitting as Circuit Judge.

After overruling a motion for a new trial, more than one year

was allowed to elapse before the plaintiffs took any further steps in the matter.

On the 23d day of April, 1884, they filed a motion in writing in said cause, asking for the "reformation, correction and amendment" of the judgment entry of the Court, which was, on the 27th day of June, 1884, denied, and a bill of exceptions allowed upon the denial of said motion.

This motion was heard and determined by the Honorable William A. Woods, Judge of the District Court, sitting as Circuit Judge.

The Petition for Mandamus.

This petition for mandamus was filed in this Court on the —— day of ————, 188—. It seeks a peremptory writ against the Judge of the Circuit Court of the Seventh Circuit of the United States, commanding him to enter upon the records of the Court at Indianapolis, the following order and judgment, in lieu and stead of the one already entered, to-wit:

Entry Asked.

It is ordered and adjudged by the Court that the said judgment in said cause, wherein Dayton S. Morgan and E. Ashley Smith were plaintiffs, and Frederick Eggers was defendant, entered on the 26th day of January, A. D. 1883, at the November Term, A. D. 1882, be and the same is hereby, amended and reformed so that the same shall conform to the complaint and finding of the Court for the plaintiffs shall read thus:

"Therefore it is considered and adjudged that they, said plaintiffs, as tenants in common, are the owners in fee simple of, and are entitled to, and shall have and recover of and from the defendant the possession of the said lands and premises in their complaint described, that is to say: All the north part of lot two (2) in section thirty-six (36) in township thirty-eight (38) north of range ten (10) west of the second principal meridian, which lies west of the track of the Lake Shore & Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2) and seven hundred and fifty-three (753) feet south therefrom; and also that plaintiffs recover of said defendants their costs of this suit, to be taxed. Or that such other order may be had in the premises as justice may require.

Indiana Practice.

By the Indiana Practive Code of 1881, Sec. 1060, it is provided * * * that the plaintiffs may recover against one or more defendants, the prem-

ises, or any part thereof, or interest therein * * * according to the rights of the parties.

As to the question of the right of one or more plaintiffs succeeding in an ejectment case and others failing, the question has been set at rest by at least three decisions of the Indiana Supreme Court.

Clements v. *Robinson*, 54 Ind. 599;

Parker v. *Small*, 58 Ind. 349;

Steeple v. *Downing*, 60 Ind. 478.

In the case in 54 Ind., while it does not rule the question of a recovery of a portion of the premises in dispute, it is valuable as showing the liberality with which that Court construes the statute.

The question as to the right to the recovery of a part of the premises is so clearly given by statute that no one has ever thought of questioning it; the language of the statute is plain, and its import and meaning unambiguous. It is therefore the right and duty of a Court, trying a case where the possession of real estate is in controversy, to render a judgment for such part of it only as appears by the evidence the plaintiff is entitled to have and recover.

This does not settle questions of boundary, although by Sec. 1068 (Code 1881) the Court may, on motion of either party, pending an action of this kind, cause a survey to be made of the property in controversy, and to make admeasurements thereof for the purposes of the action. This right is given by the Code to enable the Court to render a judgment under Sec. 1060, where the plaintiff has asked for the recovery of more real estate than he is entitled to.

But if there are any fixed monuments or other things which designate the lines dividing the land, and it is shown that the plaintiff is entitled to recover on one side of such boundary lines or designations, and the defendant ought not to be ousted from the possession on the other side of said line of boundary or designation, the Court may enter a judgment accordingly, which judgment is a determination of the right of the plaintiff to have the possession of so much of the land as lies beyond the designated points already established, and this is exactly what was done in the case at bar.

North of a certain fence on lot two (2) the defendant was entitled to maintain his possession; south of that fence the plaintiffs had a right to recover the possession. This the Court found, and entered judgment accordingly. And this action is expressly within the statutes of Indiana.

The case of *Appelgate* v. *Doe*, 2 Ind. 169, and *Volts* v. *Newbert*, 17 Ind. 190, are not in conflict with these statutes or the construction of them above given.

Boundary Lines.

There is another action given by statute in Indiana whereby corners and boundaries may be fixed by a proper proceeding. That class of actions may be brought to determine disputes in regard to boundary lines, as, for example, where adjoining proprietors fall out in relation to the true boundary lines dividing their lands, or the location of ancient marks, posts or stones which have been destroyed, removed or defaced.

In such cases the statute provides that the surveyors of the different counties, upon proper notice to adjoining proprietors, may re-establish boundary lines. (See Sec. 5955, Code 1881.)

By this mode of procedure, corners and boundary lines between adjoining proprietors are rendered fixed and certain. Monuments so established in the manner provided by this section, are but evidence of the outside boundaries of different parcels of land held and owned by different individuals. But this does not preclude a party in an ejectment proceeding from showing that he is entitled to the possession of certain parts of a tract of land, not governed by surveyors' boundaries or lines theretofore established dividing different parcels.

Where a part of the premises in dispute are recovered by the plaintiff and part held by the defendant, the Court must necessarily designate how much of the land the plaintiff fails to recover by indicating some point or line which divides the two possessions. And this does not necessarily establish boundary lines, but is a designation simply of how far the possessory right of the plaintiff extends.

The Practice Act of Indiana, so far as it governs the mode of procedure in the courts for the recovery of real property, has been adopted by the federal courts of this State. (See Indiana Digest, Davis, Vol. 1, page 19, rule 17, title real property, etc.)

Under the practice of Indiana, the Court may find specially all the facts in dispute at the request of either party. The judgment must conform to the facts thus found. But if neither party request such special finding, the Court may find generally and enter a judg-

ment on such general finding; that is to say, if the plaintiff is entitled to recover anything, the Court may find generally for the plaintiff and enter judgment for that which he is entitled to recover.

That was done in this case. The finding was made for the plaintiffs, and a judgment entered for them as to so much of the premises as the Court found from the evidence they were entitled to recover.

If the judgment was defective in order to conform to the practice of Indiana courts, it was necessary for the plaintiffs to object to the form of the judgment at the time it was entered. This would have enabled the Court to correct any formal matter or omission at the time, but it is too late after entry of judgment for the parties to object to it if they fail to do so at the time of its rendition.

Buell v. *Shuman*, 28 Ind. 464;
85 Ind. 115.

In this case there was no objection made to the form of the entry, and the Court's attention was not called to it for more than a year after it was entered. The plaintiffs then filed a motion in said Court to correct, reform and amend the order.

When Writ Granted.

We have shown that by the law and practice in force in the State of Indiana that the judgment rendered in this case was in accordance therewith. This would seem to dispose of the case.

We may be permitted, however, to call attention to some other questions which may arise in the consideration of this case.

The writ of mandamus is granted only where there is no other remedy. The power to issue the writ is largely discretionary. This discretion is not an arbitrary one; but where there is another remedy Courts will not permit this writ to issue. Moses on Mandamus, 18.

The Proprietors, etc. v. *Slack*. 7 Cush. 226.

A Judgment in Conflict with the Facts.

It is not consonant with justice to say that the trial judge who heard the evidence and decided the case, in part, against the plaintiffs, by reason of a defective or informal entry, shall be compelled by this Court, against the evidence heard by him, to enter a judgment in direct conflict with the testimony adduced, and against his judicial judgment.

If, therefore, the finding of the Court is defective, or the judgment entry informal, the only thing in law which the plaintiff can claim is to have it conform to the actual condition of facts established by the evidence, and not to have a judgment entered which would violate and falsify the facts.

At this point we make the suggestion that the petition in this case is insufficient for not showing that the evidence adduced before the trial judge did not warrant the judgment entered as it appears of record.

The petition, as well as the alternative writ, when issued, must not only contain the affirmative allegations of procedure necessary to entitle the party to the process prayed for, but it must also be averred the other facts, which would justify the omission complained of, does not exist.

Hoxie v. *County Com., etc.*, 25 Me. 333.

Moses on Mandamus, p. 19.

We do not concede that the petition, with these averments, would be sufficient, but without them it is clearly insufficient.

Remedy by Appeal.

The plaintiffs in the original action, so far as it appears from this record, had another remedy by way of appeal. If the judgment entered was erroneous, or was not supported by the evidence, a bill of exceptions, and writ of error, would have brought the case in review before this Court.

A mandamus can not be allowed to perform the office of an appeal or a writ of error.

Ex-parte Schwab, 98 U. S. 240;
Ex parte Lorring, 94 U. S. 418;
Ex parte Flippin, 94 U. S. 350.

This writ may be issued to compel inferior or subordinate judicial tribunals to exercise their functions and render some judgment in cases before them. But it will never issue directing them to perform a judicial function in a certain way or manner where the act required to be done is discretionary, or requires the exercise of judicial judgment. Moses on Mandamus, p. 23, and cases cited.

In this case the Circuit Court did not refuse to act, but on the contrary heard and determined the motion made by the plaintiffs to

reform and correct the judgment entry, and refused to comply with the prayer of their motion. This writ, therefore, can not be issued because of a refusal of the Court to act. The contention of the petitioners is that the Court refused to act in a certain manner. This, we submit, can only be reached by way of appeal.

The office of a writ of mandamus is in substance a personal action, and so rests upon the averred and assumed fact that the respondent has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right.

United States v. *Boutwell*, 17 Wall. 607.

How can it be said in this case, that the petition shows the petitioners to have a "clear right" to the relief asked for, in the absence of the evidence adduced on the trial? The judgment entered shows that the trial judge found as a matter of fact that the plaintiff had a right to the posession of only so much of lot two (2) as laid south of a certain fence then standing on said lot two, and running from the Illinois State line eastwardly to Lake Michigan.

The Entry Construed.

Judge Woods in construing the original judgment entry, so found, and overruled the motion made by the petitioners. How can this Court, in the face of the record thus presented, say, in the absence of the evidence, that that judgment entered is erroneous, and that the petitioners are entitled, without question, to have the judgment entry corrected, so that they may recover all the premises in controversy. We submit that the only office which this writ could perform would be to compel some entry to be made by the subordinate Court. That Court never having refused to make judgment entries whenever it was proper to do so, this petition must necessarily fail.

The abstract of title showing the chain under which plaintiffs claim, being in the record, some argument may be addressed to this Court on the presumption arising therefrom to justify the entry of the order prayed by the petitioners. Not supposing that such claim will be allowed by this Court, but out of abundant caution we cite authorities from the Indiana Supreme Court, which presents a case that would overcome any such presumption, if it could arise from the record in this proceeding.

Under the answer of a general traverse of the material allegations

in the complaint, all defenses may be given in evidence as if specially plead. This includes the Statute of Limitations.

By the statutes of Indiana it is provided:

> The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued and not afterwards, * * for the recovery of the possession of real estate, within twenty years.

It has been held by the Indiana Supreme Court, that an action for the recovery of real estate must be commenced within twenty years from the time the statute begins to run; and this without reference to whether the possession of the lands be adverse or not. Quoting from an English case, the Indiana Supreme Court, in the case of *Vanduyn* v. *Hepner*, 45 Ind. 596, say:

> And if one has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing ejectment, is barred by this section.

Approving this language in the case cited, the Court continues:

> Keeping in view the explicit language of the statute, and the authorities cited upon the construction of a similar statute, we are of the opinion that the possession of the defendants need not have been adverse or hostile to the plaintiff, in order that the lapse of the specified time should bar the action.

From the language made use of in the judgment entry in this case, and the condition of the issues as made by the pleadings, and matters which may be given in evidence thereunder, it is fair to presume that the trial court found that the defendant, Eggers, had been in possession of a part of the premises in dispute down to a certain fence, which was there standing at the time of the rendition of the judgment, more than twenty years; and that, having such possessory right, and the plaintiffs, and those under whom they claim, not having commenced their action within the period of twenty years after the statute began to run, were barred from a right of recovery against the defendant as to so much of the land lying north of that fence.

We make this suggestion not knowing exactly what range the argument may take on the hearing of this petition.

The Supreme Court of Indiana have also held in the case of

Bowen v. *Preston*, 48 Ind. 307, that when this Statute of Limitation is relied upon by the tenant in possession, his

title is created by the existence of the facts, and not by the exhibition of them in evidence. That an open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the tenant in possession, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character—the absolute dominion over it.

On the whole facts appearing in the record, we respectfully submit that the petitioners are not entitled to have the writ issued, either in an alternative or peremptory form.

Respectfully submitted,

A. L. OSBORN,
A. C. HARRIS,
W. H. CALKINS,
For Respondents.

MARCH 23d, 1885.

114-114

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 10. Original.

EX PARTE:
DAYTON S. MORGAN AND E. ASHLEY SMITH.

BRIEF IN REPLY.

SUBMITTING THE CASE FOR PETITIONERS.

In this case Respondents, waiving the issuing of the Alternative Writ, have made return to the Petition as a writ. Hence the Petition stands for the Alternative Writ; and the Return stands as a Return to an Alternative Writ.

The rules of pleading at common law govern in the construction of returns. These rules are distinctly stated in TAPPING ON MANDAMUS, pp. 348, 349, 351, 353, 354, 357, 361, and at the foot of page 401; also in MOSES ON MANDAMUS, at pages 210, 213, 220.

Tested by these rules, the returns admit every fact stated in the petition. Indeed, it would be difficult to traverse the

facts stated, because, except in a few particulars, they appear by matter of record, presented by reference to public statutes or by authentic exemplification. The returns are in confession and avoidance only, except one immaterial traverse, found at the foot of page 2 and first half of page 3, for matters of law are not traversible. (*Tapping*, p. 351.) The matters of fact mentioned in the clause there quoted in the return are not traversed. (*Id.*, 349.)

The rule of Indiana Circuit Court adopting the state practice in Ejectment (shown on page 4 of the return) seems immaterial in view of sec. 914, U. S. R. S., and the authorities thereon, shown in *Desty's Federal Procedure*, pp. 499–506, § 914. "The practice, pleadings, and forms and modes of "proceeding in civil causes, other than equity and admiralty "causes, in the circuit and district courts, shall conform, *as* "*near as may be*, to the practice, pleadings, and forms and "modes of proceeding existing at the time in like causes in "the courts of record of the state, within which such circuit "or district courts are held, *any rule of court to the contrary* "*notwithstanding*."

The present circuit judge (who was district judge at the time of the trial, January 20, 1883, ceased to be a judge of the United States, by resignation, in June, 1883, and was appointed circuit judge in November, 1884) undertakes, on pages 5–8 of the return, to state from memory certain evidence, which, he says, was given at the trial, tending to show the record ought not to have been made; that "the court, having heard the evidence and being fully advised, finds for the plaintiffs" on the issues made by the pleadings. Yet he states, pp. 7, 8, that the finding for the plaintiffs was deliberately entered of record. But for the accidental appointment to the circuit bench of the former district judge the matter stated could not have been presented at all to impeach the recorded finding. As it is the respondents are *estopped, by the record* they admit, to make any averment found on pages 5–7 of the return. (*Tapping*, pp. 349, 361.)

That such averments or evidence cannot be heard to explain or give effect to a record, and that no averment or proof can be made to the contrary of a record, is fully shown in our "Brief in Support of Petition," filed with the petition, beginning at the foot of page 12 and extending to the middle of page 15.

On page 8 of the return the circuit judge again travels out of the record to state matter by inuendo. I cannot travel out of the record to make an explanation.

The return concludes by naming as matter in avoidance that the petitioners, Morgan and Smith, have sued out a Writ of Error to review the judgment in ejectment and that the citation has been served on the defendant Eggers. That is true. The case bears Docket Number 1256. The transcript has been returned into this court with the Writ of Error, the proper assignment of errors has been made thereon, with prayer for reversal of so much of the judgment as appears to be erroneous. The Citation and proof of service are also on file. So if the petitioners are entitled to a remedy on the record of the circuit court they will have it in one case or the other. If *Mandamus* is the proper remedy it will come in this case and they will pay the costs of the Writ of Error. (*Insurance Co.* vs. *Comstock*, 16 Wallace, 258, p. 271.)

It is proper here to note that it appears by the notices and proofs of service on file in this case, and by the letter of Judge Woods, also on file, that the defense is here made by the Attorneys and Counsel for the defendant in ejectment, and that he is as fully heard in this case as he would be on trial of the case in error.

The "brief in support of the petition," filed with the petition, so distinctly applies to the case (the returns adding nothing to the opinion of Judge Woods on denial of the motion for amendment), that petitioners present that as their brief in the case, believing it to be in exact compliance with the rule of court.

Upon the averment on page 8 of the petition, that "the

circuit court, under and by the authority of sec. 649 of the Revised Statutes of the United States, tried said issues without the intervention of a jury; and thereupon, after said trial, the court having heard the evidence and being fully advised found for the plaintiffs upon said issues; and so the said finding was delivered and entered of record by the court;" which averment is sustained by the transcript and is admitted by the return (Tapping, *ubi supra*), I beg to refer the court again to *Tapping, p.* 372, sixth, and the illustration following.

The brief for the respondents seems to require but little reply.

The learned counsel appear to be of opinion that the laws of the United States are not in force in Indiana, and to forget that a motion for new trial, if denied, cannot be gotten into the record in a common-law case (*Indianapolis R. R.* Co. vs. *Horst*, 93 U. S., 301; *Zeller* vs. *Eckert*, 4 How., 297–8); and that the union of legal and equitable causes in one suit is impossible. (*Hurt* vs. *Hollingsworth*, 100 U. S., 100, p. 103; *Indianapolis R. R. Co.* vs. *Horst*, 93 U. S., p. 300, *Desty's Federal Procedure*, under sections 913, 914; R. S., secs. 692, 698, 750, 997, 1012; Stat. of 1875, ch. 137, sec. 3, last clause; *Constitution*, Art. III, § 2, (1), (2), *Amendment*, VII, § 1).

Defendant's brief is inaccurate as to the entry asked, and I beg to refer the court to the first paragraph of the prayer of the petition for Mandamus on page 10 thereof.

Defendant's authorities on page 4 of their brief have no application. *Parker* vs. *Small* was a bill in equity, and decided on the ground that the ejectment statute does not apply.

On pages 5 and 6 of their brief they admit *that the finding was a general finding for the plaintiffs, and that the judgment entered is, and was intended to be, for only part of the premises found for them in the verdict.* This is wholly inconsistent with the Statutes and Constitutional provisions above

cited. The law of the United States on this subject is particularly stated, with the authorities, on pages 27–33 of the "Brief in Support of the Petition."

Particular attention is called to the decision that in ejectment, upon a verdict for the whole, a judgment cannot be entered for a part. (*Obert* vs. *Hammel*, 18 N. J. L. (3 Har.), 73.) Indiana authorities can have no application.

Upon the point made by defendants on page 6 of their brief that the issue of the writ of mandamus is discretionary, we would say that if a Writ of Error will be dismissed because a remedy exists by mandamus (16 Wall., 258, p. 271) there can be no more discretion in the one case than the other, where the matter to be corrected is an error appearing by the record. (*Tapping on Mandamus*, 401, *Moses on M.*, 17.) The statute of jeofails is mandatory that no judgment shall be reversed for such fault, but the court shall amend every such defect. (R. S., § 954.)

To the argument of page 7 of defendant's brief, that petitioners should have presented all the evidence produced before the trial judge, to show that such evidence did not warrant the judgment entered variant from the verdict, I beg the court to refer to the cases in this Court quoted on pages 16–20 of my "brief in support of the petition;" though I will here quote more at large from *Garland* vs. *Davis*, 4 How., 148:

"These arguments it is our duty to examine. One is that the whole merits, according to the evidence reported, may have actually been considered and passed upon in the court below under this plea and issue. But it is a sufficient answer to this *that if so done it was illegally done*, no evidence being competent under that issue except the promise described in it, and no opinion of the jury or the court being regular or proper under it, except as to that promise alone, (Harrison *vs.* Nixon, 9 Peters, 484.)"

Garland *vs.* Davis was an action at law; Harrison *vs.* Nixon was in equity.

To the suggestion of page 9 of defendant's brief, that *it is fair to presume* that the trial court found something different from its verdict, I answer that such presumption would render void a verdict good on its face, as appears by abundant authorities in this court cited on page 24 of my brief in support of the petition, and the pages preceding and following.

Respectfully submitted.

EDWARD ROBY,
Counsel.